

No. 12153

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United States  
Court of Appeals  
for the Ninth Circuit

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SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES  
LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and  
through their Guardian ad Litem, JOSEPHINE SOUZA, JOSE-  
PHINE SOUZA, individually, and MARY ADELE SOUZA and  
GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD  
SOUZA, Minors, by and through their Guardian ad Litem, H.  
G. EASTMAN,

Appellees.

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Transcript of Record

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

**FILED**

APR 4 - 1949

PAUL P. O'BRIEN,  
CLERK



United States  
Court of Appeals  
for the Ninth Circuit

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SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

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LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and  
through their Guardian ad Litem, JOSEPHINE SOUZA, JOSE-  
PHINE SOUZA, individually, and MARY ADELE SOUZA and  
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Appellees.

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Appeal from the United States District Court  
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Southern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court for the State of California  
in and for the City and County  
of San Francisco

No. 28040-R

No. 356358

JOSEPHINE SOUZA, Individually, and as guardian ad litem for JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, and BENJAMIN SOUZA, minors, and MARY ADELE SOUZA,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLANVILLE, H. J. JOHNSON, and FIRST DOE,

Defendants.

### COMPLAINT FOR DAMAGES

Come now plaintiffs above named, and for cause of action allege:

#### I.

That Josephine Souza was duly and regularly appointed guardian ad litem of John Martin Souza, Lucille Josephine Souza, James Lawrence Souza and Benjamin Souza, minors, for the purpose of prosecuting this action and ever since has been and now is the guardian ad litem of said minors.

#### II.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State



of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the [1\*] business of a common carrier by railroad in interstate commerce in said State of California, and other states, with its principal place of business in the City and County of San Francisco, State of California.

### III.

That at all times herein mentioned, plaintiffs were, and now are, citizens and residents of the State of California.

### IV.

That at all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were citizens and residents of the State of California.

### V.

That plaintiff does not know the true name of the defendant sued herein under the fictitious name of First Doe and that when the same is ascertained, plaintiff will pray leave of court to amend this complaint accordingly, together with the appropriate charging allegations.

### VI.

That at all times herein mentioned, defendants E. S. Glanville, H. J. Johnson and First Doe, were agents, servants and employees of the defendant Southern Pacific Company, and at all times herein mentioned were acting in the course and scope of

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

their employment and hiring by the Southern Pacific Company.

#### VII.

That at all times herein mentioned, Beckwith Road is a public street and highway in the County of Stanislaus, State of California, running in a general easterly and westerly direction; that the said Beckwith Road intersects the tracks of the defendant railroad company at approximately right angles, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99. [2]

#### VIII.

That plaintiff Josephine Souza is the surviving wife of Antonio Azevedo Souza, deceased, and plaintiffs John Martin Souza, Lucille Josephine Souza, James Lawrence Souza and Benjamin Souza, minors, and Mary Adele Souza are the surviving children of plaintiff Josephine Souza, and Antonio Azevedo Souza, deceased, and that said plaintiffs are the sole heirs at law of said decedent.

#### IX.

That on or about the 11th day of October, 1945, at or about the hour of 9:00 a.m. thereof, the decedent, Antonio Azevedo Souza, was a guest passenger in a certain 1941 Ford Coupe automobile, bearing license No. 93H838, owned and operated by John Martin Souza in a general easterly direction on Beckwith Road, at the intersection thereof with the defendant Southern Pacific Company's railroad tracks.

## X.

That at said time and place, defendants E. S. Glanville, H. J. Johnson, and First Doe, while acting within the course and scope of their employment and hiring by the defendant, Southern Pacific Company, were running and operating a certain Southern Pacific Engine No. 2478, Train No. 2-59, the property of the defendant Southern Pacific Company, in a general northerly direction on defendant's railroad tracks, at the intersection thereof with Beckwith Road, as aforesaid.

## XI.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile in which the decedent, Antonio Azevedo Souza, was riding as a guest passenger as aforesaid, thereby inflicting injuries upon him which immediately resulted [3] in his death.

## XII.

That at the time of the happening of the aforesaid accident, Antonio Azevedo Souza was a well and able-bodied man of the age of fifty-seven (57) years, capable of earning and earning the sum of Two Hundred Dollars (\$200.00) per month; that all of said sum said decedent contributed to the plaintiffs as and for their maintenance and support.

## XIII.

That by reason of the death of said Antonio Azevedo Souza, plaintiffs have been further deprived of his care, comfort and society.

## XIV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Antonio Azevedo Souza proximately caused thereby, plaintiffs were compelled to and did incur an indebtedness in the sum of One Thousand One Hundred Fifty-seven and 38/100 Dollars (\$1,157.38), as and for funeral expenses, all to plaintiffs' damage in said amount.

## XV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Antonio Azevedo Souza proximately caused thereby, plaintiffs have been generally damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against defendants and each of them in the sum of One Hundred Fifty-one Thousand One Hundred Fifty-seven and 38/100 Dollars (\$151,157.38), together with their costs of suit incurred herein.

CLIFTON HILDEBRAND,  
JAMES A. MYERS,  
Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1946. [4]

[Title of Superior Court and Cause.]

## COMPLAINT FOR DAMAGES

Comes now plaintiff above named, by and through his guardian ad litem, Josephine Souza, and for cause of action alleges:

### I.

That Josephine Souza was duly and regularly appointed guardian ad litem of John Martin Souza, a minor, for the purpose of prosecuting this action and ever since has been and now is the guardian ad litem of said minor.

### II.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce [6] in said State of California, and other states, with its principal place of business in the City and County of San Francisco, State of California.

### III.

That at all times herein mentioned, plaintiff was, and now is, a citizen and resident of the State of California.

### IV.

That at all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were citizens and residents of the State of California.

## V.

That plaintiff does not know the true name of the defendant sued herein under the fictitious name of First Doe and that when the same is ascertained, plaintiff will pray leave of court to amend this complaint accordingly, together with the appropriate charging allegations.

## VI.

That at all times herein mentioned, defendants E. S. Glanville, H. J. Johnson and First Doe, were agents, servants and employees of the defendant Southern Pacific Company, and at all times herein mentioned were acting in the course and scope of their employment and hiring by the Southern Pacific Company.

## VII.

That at all times herein mentioned, Beckwith Road is a public street and highway in the County of Stanislaus, State of California, running in a general easterly and westerly direction; that the said Beckwith Road intersects the tracks of the defendant railroad company at approximately right angles, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99. [7]

## VIII.

That on or about the 11th day of October, 1945, at or about the hour of 9:00 o'clock a.m. thereof, plaintiff owned and operated a certain 1941 Ford Coupe automobile, bearing license No. 93H838 in a general easterly direction on Beckwith Road, at the intersection thereof with the defendant Southern Pacific Company's railroad tracks.



## IX.

That at said time and place the defendants E. S. Glanville, H. J. Johnson, and First Doe, while acting within the course and scope of their employment and hiring by the defendant, Southern Pacific Company, were running and operating a certain Southern Pacific Engine No. 2478, Train No. 2-59, the property of the defendant Southern Pacific Company, in a general northerly direction on defendant's railroad tracks, at the intersection thereof with Beckwith Road, as aforesaid.

## X.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile owned and operated by plaintiff, John Martin Souza, as aforesaid, and that as a direct and proximate result of such carelessness and negligence, plaintiff sustained the injuries hereinafter enumerated.

## XI.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to-wit: Concussion of the brain, numerous contusions and abrasions about the body, hand lacerations, extreme [8] pain and suffering and a severe shock to his nervous system, which injuries are, and will be, permanent.

## XII.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, plaintiff was forced to and did incur expenses for medical treatment, the exact amount and extent of which plaintiff does not now know; that plaintiff is informed and believes and therefore alleges that he will require further medical attention as a result of said injuries and will therefore incur a further indebtedness in an amount as yet unascertainable, and that when said amounts are ascertained, plaintiff will pray leave of court to insert said sums as the reasonable value of said medical treatment.

## XIII.

That at the time of the happening of the accident as aforesaid, plaintiff was a strong and able-bodied man capable of earning and earning the sum of approximately Two Hundred Dollars (\$200.00) per month; that as a direct and proximate result of the carelessness and negligence of defendants and each of them and the injuries proximately caused plaintiff thereby, plaintiff was rendered incapable of performing his usual work or services or any work or services whatsoever, and will be unable to perform his usual work or services or any work or services whatsoever for an indefinite period of time in the future, all to plaintiff's damage in an amount as yet unascertainable and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.



## XIV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them, plaintiff has been [9] generally damaged in the sum of Fifteen Thousand Dollars (\$15,000.00).

Wherefore, etc.—

As and for a second, further, separate and distinct cause of action against defendants and each of them plaintiff alleges as follows:

## I.

Plaintiff refers to Paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

## II.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile owned and operated by plaintiff, John Martin Souza, as aforesaid.

## III.

That by reason of the carelessness and negligence of defendants and each of them as aforesaid and as a direct and proximate result thereof, said plaintiff's automobile was damaged; that immediately before the happening of the accident said

plaintiff's said automobile was of the reasonable value of Eight Hundred Fifty Dollars (\$850.00); that immediately after the happening of the accident said plaintiff's said automobile was of the reasonable value of Two Hundred Dollars (\$200.00), all to plaintiff's damage in the sum of Six Hundred Fifty Dollars (\$650.00).

Wherefore, plaintiff prays judgment against defendants and each of them in the sum of Fifteen Thousand Six Hundred [10] Fifty Dollars (\$15,650.00), together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

JAMES A. MYERS,  
CLIFTON HILDEBRAND,  
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1946. [11]

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[Title of Superior Court and Cause.]

### COMPLAINT FOR DAMAGES

Come now plaintiffs above named, by and through their guardian ad litem, H. G. Eastman, and for cause of action allege:

#### I.

That H. G. Eastman was duly and regularly appointed guardian ad litem of Geraldine Souza, Lawrence Souza and Richard Souza, minors, for the purpose of prosecuting this action and ever since has been and now is the guardian ad litem of said minors.

## II.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the [13] business of a common carrier by railroad in interstate commerce in said State of California, and other states, with its principal place of business in the City and County of San Francisco, State of California.

## III.

That at all times herein mentioned, plaintiffs were, and now are, citizens and residents of the State of California.

## IV.

That at all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were citizens and residents of the State of California.

## V.

That plaintiff does not know the true name of the defendant sued herein under the fictitious name of First Doe and that when the same is ascertained, plaintiff will pray leave of court to amend this complaint accordingly, together with the appropriate charging allegations.

## VI.

That at all times herein mentioned, defendants E. S. Glanville, H. J. Johnson and First Doe, were agents, servants and employees of the defendant Southern Pacific Company, and at all times herein

mentioned were acting in the course and scope of their employment and hiring by the Southern Pacific Company.

#### VII.

That at all times herein mentioned, Beckwith Road is a public street and highways in the County of Stanislaus, State of California, running in a general easterly and westerly direction; that the said Beckwith Road intersects the tracks of the defendant railroad company at approximately right angles, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99. [14]

#### VIII.

That plaintiff Geraldine Souza is the surviving wife of Edward Anthony Souza, deceased, and plaintiffs Lawrence Souza and Richard Souza are the surviving minor children of plaintiff Geraldine Souza, and Edward Anthony Souza, deceased, and that said plaintiffs are the sole heirs at law of said decedent.

#### IX.

That on or about the 11th day of October, 1945, at or about the hour of 9:00 o'clock a.m. thereof, the decedent, Edward Anthony Souza, was a guest passenger in a certain 1941 Ford Coupe automobile, bearing license No. 93H838, owned and operated by John Martin Souza in a general easterly direction on Beckwith Road, at the intersection thereof with the defendant Southern Pacific Company's railroad tracks.

## X.

That at said time and place, the defendants E. S. Glanville, H. J. Johnson, and First Doe, while acting within the course and scope of their employment and hiring by the defendant, Southern Pacific Company, were running and operating a certain Southern Pacific Engine No. 2478, Train No. 2-59, the property of the defendant Southern Pacific Company, in a general northerly direction on defendant's railroad tracks, at the intersection thereof with Beckwith Road, as aforesaid.

## XI.

That at said time and place, said defendants, and each of them, so carelessly and negligently operated and propelled defendant's locomotive as aforesaid, as to cause said engine to collide with the automobile in which the decedent, Edward Anthony Souza, was riding as a guest passenger as aforesaid, thereby inflicting injuries upon him which immediately resulted in his death.

## XII.

That at the time of the happening of the aforesaid [15] accident, Edward Anthony Souza was a well and able-bodied man of the age of twenty-four (24) years, capable of earning and earning the sum of Two Hundred Dollars (\$200.00) per month; that all of said sum said decedent contributed to the plaintiffs as and for their maintenance and support.

## XIII.

That by reason of the death of said Edward Anthony Souza, plaintiffs have been further deprived of his care, comfort and society.

## XIV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Edward Anthony Souza proximately caused thereby, plaintiffs were compelled to and did incur the following indebtedness:—the sum of Fifty-eight Dollars (\$58.00), as and for hospital expenses for Edward Anthony Souza, the sum of Eighteen Dollars (\$18.00), as and for laboratory expenses for Edward Anthony Souza, the sum of Six Dollars (\$6.00), as and for ambulance service for Edward Anthony Souza, and the sum of One Thousand Forty-seven and 38/100 Dollars (\$1,048.38), as and for funeral expenses, for Edward Anthony Souza, all to plaintiff's damage in the sum of One Thousand One Hundred Twenty-nine and 38/100 Dollars \$1,129.38).

## XV.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them as aforesaid, and the death of said Edward Anthony Souza proximately caused thereby, plaintiffs have been generally damaged to the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiffs pray judgment against de-



endants and each of them in the sum of One Hundred Fifty-one Thousand One Hundred Twenty-nine and 38/100 Dollars (\$151,129.38), together [16] with their costs of suit incurred herein.

/s/ JAMES A. MYERS,

HILDEBRAND, BILLS &  
McLEOD,

Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1946. [17]

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[Title of Superior Court and Cause.]

### ANSWER

Comes now, Southern Pacific Company, a corporation, and E. S. Glanville, and each severally answering shows as follows:

#### I.

Admits the allegations of Paragraph I and further admits as follows:

At all times herein mentioned, defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business as a common carrier by railroad in interstate commerce in the State of California and other States, with its California principal place of business in the City and County of San Francisco, State of California. At all times herein mentioned, [18] defendants E. S. Glanville and H. J. Johnson were

employees of defendant Southern Pacific Company, were acting in the course and scope of their employment and hiring and were citizens and residents of the State of California.

At all times herein mentioned, Beckwith Road is a county road in the County of Stanislaus, State of California, running in a general easterly and westerly direction, and intersects the tracks of defendant Southern Pacific Company at an angle, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99.

On October 11, 1945, at or about the hour of 9:02 a.m., Antonio Azevedo Souza was riding in a 1941 Ford Coupe automobile easterly along said Beckwith Road with his sons, John Martin Souza and Edward A. Souza. At said time and place, defendants E. S. Glanville and H. J. Johnson were operating Southern Pacific Company engine No. 2478, Train No. 2-59, in a general northerly direction along said railroad tracks, and approaching the intersection of Beckwith Road with said tracks. As said engine reached said intersection, John Martin Souza drove said automobile on to said railroad tracks and collided with said engine. In this collision, Antonio Azevedo Souza was killed.

## II.

Defendants above named each is without sufficient information and belief on the subject sufficient to enable it or him to answer the allegations contained in Paragraphs III, V, VIII, XII, XIII



and XIV, and on such ground each denies each and every allegation contained therein. Defendant Southern Pacific Company denies that it, or any of its officers, agents, servants or employees was negligent in the premises or in respect of any of the matters alleged in the complaint. Defendant E. S. Glanville [19] denies that he was negligent in the premises or in respect of any of the matters alleged in the complaint. Each defendant above named severally denies that any alleged negligence thereof was a cause, proximate or otherwise, of the accident, injuries, death or damages, if any, alleged by the complaint.

And for a second, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

### I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. Antonio Azevedo Souza was negligent in those matters alleged in the complaint, negligently conducted himself in and rode in said automobile, and negligently conducted himself in and about the maintenance, driving, operation and control of said automobile, with the result that said automobile collided with said engine. The conduct, as aforesaid, of said Antonio Azevedo Souza proximately caused and contributed to said collision, the death of Antonio Azevedo Souza, and to the damages, if any, alleged by plaintiffs.

And for a third, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing and thereby caused said automobile [20] to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the death of Antonio Azevedo Souza, and the damages, if any, alleged by plaintiff.

And for a fourth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing and thereby

caused said automobile to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, was the sole cause, and the sole proximate cause, of the accident, the death of Antonio Azevedo Souza, and the damages, if any, alleged by plaintiffs.

And for a fifth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

### I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is informed and believes, and on such ground each alleges that at said time and place, and on said occasion, said Antonio Azevedo Souza and said John Martin Souza, in the operation and driving of said automobile, were engaged in a joint undertaking and venture, and that said Antonio Azevedo Souza in the [21] premises had the right to control the manner of maintenance, driving, operation and control of said automobile, and at said time and on said occasion and in all the circumstances aforesaid, said automobile was being maintained, driven, operated and controlled for the joint benefit of said Antonio Azevedo Souza and John Martin Souza.

And for a sixth, separate and independent answer and defense, defendants Southern Pacific Com-

pany and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is informed and believes, and on such ground each alleges that said John Martin Souza was the agent of said Antonio Azevedo Souza, and John Martin Souza was acting in the scope and course of said agency while maintaining, driving, operating and controlling said automobile. At said time and on said occasion mentioned in the complaint and herein, John Martin Souza, acting as agent as aforesaid, for Antonio Azevedo Souza, so negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing that said automobile was proximately caused to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the death of Antonio Azevedo Souza, and the damages, if any, alleged by plaintiff.

Wherefore, said defendants, and each of them prays that plaintiffs take nothing by their complaint on file herein; that defendants, and each of them go hence without day; that defendants and each of them have judgment for costs of suit in-

curred herein; and for such other, different and further relief, as, the premises considered, is proper.

Dated: December 7, 1946.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants Southern Pacific Company and E. S. Glanville.

(Duly Verified.)

(Affidavit of Service by Mail.)

[Endorsed]: Filed Dec. 9, 1946. [23]

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[Title of Superior Court and Cause.]

### ANSWER

Comes now, Southern Pacific Company, a corporation, and E. S. Glanville, and each severally answering shows as follows:

Admits the allegations of Paragraph I of the first alleged cause of action, and those portions of Paragraph I of the second alleged cause of action which incorporate by reference the provisions of Paragraph I of the first alleged cause of action, and further admits as follows:

At all times herein mentioned, defendant Southern [25] Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business as a common carrier by railroad in interstate commerce in the State of California and other



States, with its California principal place of business in the City and County of San Francisco, State of California. At all times herein mentioned, defendants E. S. Glanville and H. J. Johnson were employees of defendant Southern Pacific Company, were acting in the course and scope of their employment and hiring and were citizens and residents of the State of California.

At all times herein mentioned, Beckwith Road is a county road in the County of Stanislaus, State of California, running in a general easterly and westerly direction, and intersects the tracks of defendant Southern Pacific Company at an angle, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99.

On October 11, 1945, at or about the hour of 9:02 a.m., John Martin Souza was driving a 1941 Ford Coupe automobile easterly along said Beckwith Road with his father, Antonio Azevedo Souza, and his brother, Edward A. Souza. At said time and place, defendant E. S. Glanville and H. J. Johnson were operating Southern Pacific Company engine No. 2478, Train No. 2-59, in a general northerly direction along said railroad tracks, and approaching the intersection of Beckwith Road with said tracks. As said engine reached said crossing, John Martin Souza drove said automobile on to said railroad tracks and collided with said engine. In this collision, John Martin Souza was injured, the nature and extent of which injuries being unknown to either defendant.

## II.

Defendants above named each is without information [26] or belief on the subject sufficient to enable it or him to answer the allegations of Paragraphs III and V of the first alleged cause of action, or those portions of Paragraph I of the second alleged cause of action which incorporate by reference the provisions of Paragraph III and V of the first alleged cause of action, or the allegations in respect of the injuries, medical and hospital expenses, or the allegations in respect of the damage to said automobile, and on such ground denies each and every such allegation. Defendant Southern Pacific Company denies that it, or any of its officers, agents, servants or employees was negligent in the premises or in respect of any of the matters alleged in the complaint. Defendant E. S. Glanville denies that he was negligent in the premises or in respect of any of the matters alleged in the complaint. Each defendant above named severally denies that any alleged negligence thereof was a cause, proximate or otherwise, of the accident, injuries, death or damages, if any, alleged by the complaint.

And for a second, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

## I.

Defendants above named each repeats, realleges and incorporates herein all the matters set forth in

Paragraph I of the first answer and defense. John Martin Souza was negligent in those matters alleged in the complaint, and negligently drove said automobile, with the result that said automobile collided with the engine and John Martin Souza was injured. The conduct, as aforesaid, of John Martin Souza proximately caused and contributed to said accident, injuries and damages, if any, alleged by plaintiff. [27]

And for a third, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

### I.

Defendants above named each repeats, realleges and incorporates herein all the matters set forth in Paragraph I of the first answer and defense. John Martin Souza was negligent in those matters alleged in the complaint, and negligently drove said automobile, with the result that said automobile collided with the engine and John Martin Souza was injured. The conduct, as aforesaid, of John Martin Souza, was the sole cause, and the sole proximate cause, of said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, said defendants, and each of them prays that plaintiffs take nothing by their complaint on file herein; that defendants, and each of them go hence without day; that defendants and each of them have judgment for costs of suit in-



curred herein; and for such other, different and further relief, as the premises considered, is proper.

Dated: December 7, 1946.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants Southern Pacific Company, and E. S. Glanville.

(Duly Verified.)

(Acknowledgment of Service by Mail.)

[Endorsed]: Filed Dec. 9, 1946. [28]

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[Title of Superior Court and Cause.]

### ANSWER

Comes now, Southern Pacific Company, a corporation, and E. S. Glanville, and each severally answering shows as follows:

#### I.

Admits the allegations of Paragraph I and further admits as follows:

At all times herein mentioned, defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business as a common carrier by railroad in interstate commerce in the State of California and other States, with its [30] California principal place of business in the City and County of San Francisco, State of California. At all times herein mentioned, defend-

ants E. S. Glanville and H. J. Johnson were employees of defendant Southern Pacific Company, were acting in the course and scope of their employment and hiring and were citizens and residents of the State of California.

At all times herein mentioned, Beckwith Road is a county road in the County of Stanislaus, State of California, running in a general easterly and westerly direction, and intersects the tracks of defendant Southern Pacific Company at an angle, which said tracks run in a general northerly and southerly direction, and parallel to U. S. Highway No. 99.

On October 11, 1945, at or about the hour of 9:02 a.m., Edward A. Souza was riding in a 1941 Ford Coupe automobile easterly along said Beckwith Road with his brother, John Martin Souza, and his father, Antonio Azevedo Souza. At said time and place, defendants E. S. Glanville and H. J. Johnson were operating Southern Pacific Company engine No. 2478, Train No. 2-59, in a general northerly direction along said railroad tracks, and approaching the intersection of Beckwith Road with said tracks. As said engine reached said intersection, John Martin Souza drove said automobile on to said railroad tracks and collided with said engine. In this collision, Edward A. Souza was killed.

## II.

Defendants above named each is without sufficient information and belief on the subject sufficient to enable it or him to answer the allegations contained in Paragraphs III, V, VIII, XII, XIII and XIV,

and on such ground each denies each and every allegation contained therein. Defendant Southern Pacific Company denies that it, or any of its officers, agents, servants [31] or employees was negligent in the premises or in respect of any of the matters alleged in the complaint. Defendant E. S. Glanville denies that he was negligent in the premises or in respect of any of the matters alleged in the complaint. Each defendant above named severally denies that any alleged negligence thereof was a cause, proximate or otherwise, of the accident, injuries, death or damages, if any, alleged by the complaint.

And for a second, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

### I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. Edward A. Souza was negligent in those matters alleged in the complaint, negligently conducted himself in and rode in said automobile, and negligently conducted himself in and about the maintenance, driving, operation and control of said automobile, with the result that said automobile collided with said engine. The conduct, as aforesaid, of said Edward A. Souza proximately caused and contributed to said collision, the death of Edward A. Souza, and to the damages, if any, alleged by plaintiffs.

And for a third, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully [32] maintained, operated, drove and controlled said automobile into and upon said crossing and thereby caused said automobile to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the Death of Edward A. Souza, and the damages, if any, alleged by plaintiff.

And for a fourth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges and incorporates herein the provisions of Paragraph I of the first answer and defense above set forth. At said time and on said occasion, John Martin Souza negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing and thereby caused said automobile to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, was the sole cause, and the sole

proximate cause, of the accident, the death of Edward A. Souza, and the damages, if any, alleged by plaintiffs.

And for a fifth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is informed and believes, and on such ground each alleges that at said time and place, and on said occasion, said Edward A. Souza and said John Martin Souza, in the operation and driving of said [33] automobile, were engaged in a joint undertaking and venture, and that said Edward A. Souza in the premises had the right to control the manner of maintenance, driving, operation and control of said automobile, and at said time and on said occasion and in all the circumstances aforesaid, said automobile was being maintained, driven, operated and controlled for the joint benefit of said Edward A. Souza and John Martin Souza.

And for a sixth, separate and independent answer and defense, defendants Southern Pacific Company and E. S. Glanville each severally shows as follows:

I.

Defendants above named each severally repeats, realleges, and incorporates herein all the matters alleged in Paragraph I of the first answer and defense above set forth. Each said defendant is



informed and believes, and on such ground each alleges that said John Martin Souza was the agent of said Edward A. Souza, and John Martin Souza was acting in the scope and course of said agency while maintaining, driving, operating and controlling said automobile. At said time and on said occasion mentioned in the complaint and herein, John Martin Souza, acting as agent as aforesaid, for Edward A. Souza, so negligently, carelessly and unlawfully maintained, operated, drove and controlled said automobile into and upon said crossing that said automobile was proximately caused to come into collision with said engine. The conduct, as aforesaid, of said John Martin Souza, proximately caused and contributed to the accident, the death of Edward A. Souza, and the damages, if any, alleged by plaintiff.

Wherefore, said defendants, and each of them prays that plaintiffs take nothing by their complaint on file herein; that defendants, and each of them go hence without day; that [34] defendants and each of them have judgment for costs of suit incurred herein; and for such other, different and further relief, as, the premises considered, is proper.

Dated: December 7, 1946.

/s/ A. B. DUNNE,

/s/ DUNNE AND DUNNE,

Attorneys for Defendants Southern Pacific Company, and E. S. Glanville.

(Duly Verified.)

(Acknowledgment of Service by Mail.)

[Endorsed]: Filed Dec. 9, 1946. [35]

In the Superior Court of the State of California in  
and for the City and County of San Francisco

No. 356358

JOSEPHINE SOUZA, individually, and as guardian ad litem for  
JOHN MARTIN SOUZA, LUCILLA JOSEPHINE SOUZA,  
JAMES LAWRENCE SOUZA, and BENJAMIN SOUZA, minors,  
and MARY ADELE SOUZA, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLAN-  
VILLE, H. J. JOHNSON and FIRST DOE,

Defendants.

No. 356359

JOHN MARTIN SOUZA, a minor, by and through his guardian ad  
litem, JOSEPHINE SOUZA, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLAN-  
VILLE, H. J. JOHNSON and FIRST DOE,

Defendants.

No. 356360

GERALDINE SOUZA, LAWRENCE SOUZA, and RICHARD  
SOUZA, minors, by and through their guardian ad litem, H. G.  
EASTMAN, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, E. S. GLAN-  
VILLE and H. J. JOHNSON and FIRST DOE,

Defendants.

## STIPULATION AND ORDER CONSOLIDATING CASES

It Is Hereby Stipulated by and between plain-  
tiffs, in the above-entitled causes, and each of them,  
and Southern Pacific Company and E. S. Glan-  
ville, defendants in each of the above entitled cases,  
by and through their respective counsel, that the  
several cases above entitled may be consolidated  
into one action in this court, and the orders, pro-



ceedings and pleadings theretofore had in said actions respectively, stand as orders and proceedings in the consolidated case, and the consolidated case proceed under the title and number as follows: "John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, minors, by and through their guardian ad litem Josephine Souza, Josephine Souza individually, and Mary Adele Souza; and Geraldine Souza, Lawrence Souza, and Richard Souza, minors, by and through their guardian ad litem, H. G. Eastman, Plaintiffs, vs. Southern Pacific Company, a corporation, E. S. Glanville, and H. J. Johnson, and First Doe, Defendants, No. 356358, Consolidated Cause."

Dated: April 1, 1947.

/s/ JAMES A. MYERS,

/s/ HILDEBRAND, BILLS &  
McLEOD,

Attorneys for respective  
parties plaintiff.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for defendants, Southern Pacific Co.  
and E. S. Glanville.

So ordered this 10th day of April, 1947.

Dated: April 10, 1947.

/s/ GEORGE W. SCHONFELD,

Judge of the Superior Court.

[Endorsed]: Filed April 10, 1947. [38]

[Title of Superior Court and Cause No. 356,358.]

PETITION OF SOUTHERN PACIFIC COMPANY FOR REMOVAL OF THE ABOVE-ENTITLED SUIT FROM THE ABOVE-ENTITLED COURT TO THE UNITED STATES DISTRICT COURT.

To the Honorable, the Superior Court of the State of California, in and for the City and County of San Francisco:

Your petitioner, Southern Pacific Company, a corporation, petitions to remove the above-entitled cause from the above-entitled Court to the District Court of the United States [39] in and for the Northern District of California, Southern Division, respectfully shows:

I.

Your petitioner, Southern Pacific Company, at the time of the commencement of the above-entitled suit and action, and at all times mentioned in the complaint in said action, and herein, was, and it now is, a corporation duly created, organized and existing under and by virtue of the laws of the State of Kentucky but of no other state, and at all of said times was not, and is not now, a citizen or resident of the State of California or of any state other than the State of Kentucky.

II.

Your petitioner, Southern Pacific Company, is a defendant in the above-entitled action and as such files and presents this petition for removal.

## III.

The above-entitled action was commenced in the above-entitled Court by the filing of three complaints therein on August 12, 1946. Upon the commencement of each action, summons was issued therein. The first action was entitled "Josephine Souza, individually and as guardian ad litem for John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, and Benjamin Souza, Minors, and Mary Adele Souza, Plaintiffs, v. Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe, Defendants," and was numbered No. 356,358 by the Clerk of this Court. A copy of said summons and complaint was served on your petitioner, defendant Southern Pacific Company, and on defendant E. S. Glanville. Thereafter, on December 9, 1946, and within time allowed defendants Southern Pacific Company and E. S. Glanville appeared herein and filed their answer herein. [40]

## IV.

At the time of the commencement of this action No. 356,358, Josephine Souza, individually and as guardian ad litem for John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, and Benjamin Souza, Minors, and Mary Adele Souza, plaintiffs therein were and now are the only parties plaintiff in said action. Petitioner is informed and believes and upon such ground alleges and said complaint alleges that at the date of filing of said complaint and at all times mentioned herein said plaintiffs and each of them were and now are resi-

dents and citizens of the State of California and not residents nor citizens of the State of Kentucky.

V.

In said complaint and in said action No. 356,358 there were and are now named as defendants only the following: Petitioner Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe. Said complaint alleges that defendants named as E. S. Glanville and H. J. Johnson were citizens and residents of the State of California. Said complaint alleges that defendant First Doe is sued by fictitious name.

VI.

Said H. J. Johnson has not been served with summons and complaint in said action No. 356,358. H. J. Johnson has not appeared in said action as a party. No person has been served with summons and complaint in said action as said fictitiously named defendant, and no persons have appeared in said action as a party, nor has any defendant appeared excepting your petitioner Southern Pacific Company and E. S. Glanville.

VII.

The second action was entitled "John Martin Souza, [41] a Minor, by and through his guardian ad litem, Josephine Souza, Plaintiff, v. Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe, Defendants," and was numbered No. 356,359 by the Clerk of this Court. A copy of said summons and complaint was served upon your petitioner, defendant Southern Pacific

Company, and on defendant E. S. Glanville. Thereafter, on December 9, 1946, and within time allowed, defendants Southern Pacific Company and E. S. Glanville appeared herein and filed their answer herein.

### VIII.

At the time of the commencement of said action No. 356,359, John Martin Souza, a Minor by and through his guardian ad litem, Josephine Souza, plaintiffs therein were and now are the only parties plaintiff in said action. Petitioner is informed and believes and upon such ground alleges and said complaint alleges that at the date of the filing of said complaint and at all times mentioned, said plaintiffs and each of them were and now are residents and citizens of the State of California and not residents nor citizens of the State of Kentucky.

### IX.

In said complaint and in said action No. 356,359 there were and are now named as defendants only the following: Petitioner Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe. Said complaint alleges that defendants named as E. S. Glanville and H. J. Johnson were citizens and residents of the State of California. Said complaint alleges that defendant First Doe is sued by fictitious name.

### X.

Said H. J. Johnson has not been served with summons and complaint in said action No. 356,359. H. J. Johnson has [42] not appeared in said action as a party. No person has been served with summons



and complaint in said action as said fictitiously named defendant, and no persons have appeared in said action as a party, nor has any defendant appeared excepting your petitioner Southern Pacific Company and E. S. Glanville.

## XI.

The third action was entitled "Geraldine Souza, Lawrence Souza and Richard Souza, Minors by and through their guardian ad litem, H. G. Eastman, Plaintiffs, v. Southern Pacific Company, a corporation, E. S. Glanville and H. J. Johnson, and First Doe, Defendants" and was numbered No. 356,360 by the Clerk of this Court. A copy of said summons and complaint was served upon your petitioner, defendant Southern Pacific Company, and upon defendant E. S. Glanville. Thereafter, on December 9, 1946, and within time allowed, defendants Southern Pacific Company and E. S. Glanville appeared herein and filed their answer herein.

## XII.

At the time of the commencement of the said action No. 356,360, Geraldine Souza, Lawrence Souza, and Richard Souza, Minors by and through their guardian ad litem H. G. Eastman, plaintiffs therein were and are the only parties plaintiff in said action, Petitioner is informed and believes and upon such ground alleges and said complaint alleges that at the date of the filing of said complaint and at all times mentioned, said plaintiffs and each of them were and now are residents and citizens of the State of California and not residents nor citizens of the state of Kentucky.

## XIII.

In said complaint and in said action No. 356,360 there were and now are named as defendants only the following: Petitioner Southern Pacific Company, a corporation, E. S. Glanville, H. J. Johnson and First Doe. Said complaint alleges that defendants named as E. S. Glanville and H. J. Johnson were citizens and residents of the State of California. Said complaint alleges that defendant First Doe is sued by fictitious name.

## XIV.

Said H. J. Johnson has not been served with summons and complaint in said action No. 356,360. H. J. Johnson has not appeared in said action as a party. No person has been served with summons and complaint in said action as said fictitiously named defendant, and no persons have appeared in said action as a party, nor has any defendant appeared excepting your petitioner Southern Pacific Company and E. S. Glanville.

## XV.

On April 10, 1947, pursuant to stipulation of attorneys for respective parties plaintiff and defendants Southern Pacific Company and E. S. Glanville in each of the three actions heretofore mentioned, this Court made and entered its order consolidating said three actions into one action in this Court and ordering that said consolidated case proceed under the title and number as follows: "John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, Minors, by and through their guardian ad litem, Josephine Souza,



Josephine Souza, Individually, and Mary Adele Souza and Geraldine Souza, Lawrence Souza, and Richard Souza, Minors, by and through their Guardian ad litem, H. G. Eastman, Plaintiffs, v. Southern Pacific Company, a corporation, E. S. Glanville and H. J. Johnson, and First Doe, Defendants, No. 356,358, Consolidated Cause.”

#### XVI.

Petitioner Southern Pacific Company is informed and [44] believes and upon such grounds alleges that defendant E. S. Glanville died subsequent to December 9, 1946, and is now deceased. Any action against him for damages for alleged negligence thereupon terminated, and deceased is no longer a party to this action.

#### XVII.

Your petitioner, Southern Pacific Company has made and files and offers herewith its bond, with good and sufficient surety, for its entering in the District Court of the United States in and for the Northern District of California, Southern Division, within thirty (30) days from the date of filing this petition, a certified copy of the record in said suit, and for paying all costs that may be awarded by the said District Court of the United States if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

#### XVIII.

The above-entitled suit and action is of a civil nature at law, of which the District Courts of the United States are given jurisdiction, brought for the recovery of damages claimed in said suit in the

sum of \$151,157.38, and therein claimed to have resulted from the alleged negligence of petitioner, Southern Pacific Company, all as appears from the complaint in said suit. Your petitioner, Southern Pacific Company, wholly contests and denies said claims and each of them. The amount in controversy in said suit exceeds, exclusive of interest and costs, the sum and value of \$3,000.00, and exclusive of interest and costs, is the sum and value of \$151,157.38.

### XIX.

On April 19, 1948, the said consolidated cause came on for trial before this Court, sitting with a jury, and petitioner's [45] counsel suggested the fact of the death of said E. S. Glanville, and plaintiffs, by their counsel, announced themselves as ready for trial without having had summons and complaint in said action, or any of the three actions heretofore mentioned, now consolidated in one action served upon said H. J. Johnson or the defendant sued therein by fictitious name and without continuing said action for the service of summons and complaint on said defendants. By announcing themselves as ready for trial, without service of summons and complaint upon said defendants, or any of them, plaintiffs thereby voluntarily elected to proceed with the action against defendant Southern Pacific Company alone and such election amounts to a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, as though said action had originally been brought against such

defendant alone. Said action now involves a controversy wholly between citizens of different states, and which can be fully determined between them, that is to say, between said plaintiffs, citizens and residents of the State of California, and non-residents of the State of Kentucky, on one hand, and petitioner herein, a citizen and resident of the State of Kentucky, and a non-resident of the State of California on the other hand, from the time of and after the said announcement by plaintiffs that they were ready for trial without the service of summons and complaint upon said H. J. Johnson or upon the fictitiously named defendant, and there existed and there still exists in said action a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, which can be fully determined as between said resident plaintiffs and said non-resident defendant without the presence of any of the [46] other defendants as parties in said action, and said separable controversy is of a civil nature at law of which District Courts of the United States have jurisdiction. Upon the said announcement by plaintiffs to proceed with the trial as aforesaid, said action, which prior to and up to the time of said announcement had not been removable to a United States District Court, thereupon and for the first time became removable to the proper United States District Court upon the ground that there existed and still exists a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, petitioner herein, and upon the further ground that said announcement by

said plaintiffs was a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, and, so far as it is concerned, converted said action into a separate action against Southern Pacific Company as effectively as if Southern Pacific Company had originally been made the sole defendant. Thereupon, and promptly after said announcement and before any other step or steps had been taken by petitioner in said action or in the defense thereof, your petitioner filed this, its petition for the removal of the action to the proper United States District Court.

## XX.

By reason of the premises, said action is one wholly and solely between the plaintiffs, residents and citizens of the State of California on one hand, and petitioner Southern Pacific Company, a corporation, a resident and citizen of the State of Kentucky on the other hand, and said action is properly removable to the District Court of the United States in and for the Northern District of California, Southern Division. [47]

## XXI.

Petitioner shows that by reason of the premises, it desires to and is entitled to have said action removed from the Superior Court of the State of California, in and for the City and County of San Francisco, into the District Court of the United States in and for the Northern District of California, Southern Division.

Wherefore, petitioner prays that this Honorable Court accept its bond as good and sufficient, ap-

proving the same, and make its order for the removal of said suit and action into the District Court of the United States in and for the Northern District of California, Southern Division, pursuant to the Act of Congress in such cases made and provided and to cause the record herein to be certified to said District Court of the United States and to be removed thereto, and that no other further proceedings be had in this suit and action in this Honorable Court, and for such other, further and different relief as, the premises considered, is proper.

SOUTHERN PACIFIC

COMPANY, a corporation,

By LOUIS L. PHELPS,

Petitioner.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Petitioner, Southern Pacific Company.

(Duly Verified.)

[Endorsed]: Filed April 20, 1948. [48]



[Title of Superior Court and Cause.]

### ORDER FOR REMOVAL

It appears to the Court and the Court finds that defendant Southern Pacific Company, a corporation, duly filed herein its verified petition for removal of the above-entitled suit and action to the District Court of the United States in and for the Northern District of California, Southern Division, and duly made, and with said petition duly filed, its bond, conditioned as required by law and as in said petition averred; that prior to filing said petition and bond, defendant Southern Pacific Company duly gave notice thereof to the adverse parts; [50] that after the filing of said petition and bond they were duly and regularly presented to this Court on April 19, 1948, and as noticed in said written notice and within the time within which defendant Southern Pacific Company was required by the laws of the State of California and the rules of this Court to appear or answer or plead to the complaint in said action; and now

The Court having considered the matters presented as aforesaid and being advised in the premises, finds and adjudges that said petition and bond were duly noticed, filed and presented, that the said petition is good, true and sufficient, and that the said bond is good and sufficient, and good cause appearing therefore,

It Is Ordered, Adjudged and Decreed that said bond be, and the same is hereby, accepted as good and sufficient, and the above-entitled suit and ac-

tion be, and it is hereby, removed to the District Court of the United States in and for the Northern District of California, Southern Division; and

It Is Further Ordered that no further steps or proceedings be taken or had in said suit in this Court and that all proceedings and steps in said suit in this Court be, and the same are hereby, stayed.

Done in open court this 19th day of April, 1948.

/s/ MELVYN I. CRONIN,

Judge of the Superior Court.

[Endorsed]: Filed April 20, 1948. [51]

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[Title of Court and Cause No. 28040-R.]

### DEMAND FOR TRIAL BY JURY

To the Defendants Above Named and to A. B. Dunne and Dunne & Dunne, Their Attorneys:

You, and each of you, are hereby notified that plaintiffs above named demand a trial by jury in the above-entitled cause in accordance with Rule 38 B of the Rules of Civil Procedure of the above-entitled Court; reserving, however, any right plaintiff may have in connection with motion to remand.

Dated: May 13, 1948.

HILDEBRAND, BILLS &

McLEOD,

JAMES A. MYERS,

Attorneys for Plaintiffs.

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 14, 1948. [52]



In the District Court of the United States for the  
Northern District of California,  
Southern Division

No. 28040-R

JOHN MARTIN SOUZA, LUCILLE JOSEPH-  
INE SOUZA, JAMES LAWRENCE SOUZA,  
BENJAMIN SOUZA, Minors, by and through  
their guardian ad litem, JOSEPHINE SOUZA,  
JOSEPHINE SOUZA, Individually, and  
MARY ADELE SOUZA and GERALDINE  
SOUZA, LAWRENCE SOUZA and RICH-  
ARD SOUZA, Minors, by and through their  
guardian ad litem, H. G. EASTMAN,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-  
tion, E. S. GLANVILLE and H. J. JOHNSON  
and FIRST DOE,  
Defendants.

### NOTICE OF MOTION TO REMAND

To the Defendants Above Named and to Their At-  
torneys Herein:

You, and each of you, please take notice that  
plaintiffs in the above-entitled action will move the  
above-entitled Court to remand the within action to  
the Superior Court of the State of California, in  
and for the City and County of San Francisco.

Said motion will be made in the courtroom of the  
above-entitled Court on Monday, May 24, 1948, at  
the hour of ten o'clock a.m., or as soon thereafter  
as counsel may be heard. [53]

Said motion will be made upon all the records and files of the within action and upon the Motion to Remand attached hereto.

JAMES A. MYERS,

CLIFTON HILDEBRAND,

Attorneys for Plaintiffs. [54]

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[Title of District Court and Cause.]

### ORDER SHORTENING TIME

Good Cause Appearing Therefor, it is hereby ordered, adjudged and decreed that the time for service of Notice of Motion to Remand and Motion to Remand is hereby shortened and that said Notice and Motion may be served upon the defendants through their respective counsel at any time prior to 12:00 noon, May 20, 1948.

MICHAEL J. ROCHE,

Judge of the United States District Court.

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[Title of District Court and Cause.]

### MOTION TO REMAND

To the Honorable United States District Court,  
Northern District of California, Southern Division:

Now come plaintiffs above named and move the Court to remand the above-entitled cause to the Superior Court of the State of California, in and for the City and County of San Francisco, from whence it was removed for trial for the following reasons:

## I.

Because some of the defendants herein are residents and [56] citizens of the State of California and plaintiffs are residents of the State of California, and the defendant Southern Pacific Company, is a resident corporation duly incorporated under and by virtue of the laws of the State of Kentucky; that there is involved in this suit no separable controversy which is wholly between citizens of another state on the one hand and citizens of the State of California on the other hand, all of which facts are apparent from the record in this case.

## II.

In its petition for removal which was acted upon by the Superior Court of the State of California, in and for the City and County of San Francisco, the defendant Southern Pacific Company alleges in Paragraph XIX:

“On April 19, 1948, the said consolidated cause came on for trial before this Court sitting with a jury, and petitioner’s counsel suggested the fact of the death of said E. S. Glanville, and plaintiffs, by their counsel, announced themselves as ready for trial without having had summons and complaint in said action, or any of the three actions heretofore mentioned, now consolidated in one action served upon said H. J. Johnson or the defendant sued therein by fictitious name and without continuing said action for the service of summons and complaint on said defendants. By announcing themselves as ready for trial, without service of summons and complaint upon said defendants, or any

of them, plaintiffs thereby voluntarily elected to proceed with the action against defendant Southern Pacific Company alone and such election amounts to a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, as though said action had originally been brought against such defendant alone. Said action now involves a controversy wholly between citizens of different states, and which can be fully determined between them, that is to say, between said plaintiffs, citizens and residents of the State of California, and non-residents of the State of Kentucky, on one hand, and petitioner herein, a citizen and resident of the State of Kentucky, and a non-resident of the State of California on the other hand, from the time of and after the said announcement by plaintiffs that they were ready for trial without the service of summons and complaint upon said H. J. Johnson or upon the fictitiously named defendant, and there existed and there still exists in said action a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, which can be fully determined as between said resident plaintiffs and said non-resident defendant without the presence of any of the other defendants as parties in said action, and said separable controversy [57] is of a civil nature at law of which District Courts of the United States have jurisdiction. Upon the said announcement by plaintiffs to proceed with the trial, as aforesaid, said action, which prior to and up to the time of said announce-

ment had not been removable to a United States District Court, thereupon and for the first time became removable to the proper United States District Court upon the ground that there existed and still exists a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company, petitioner herein, and upon the further ground that said announcement by said plaintiffs was a complete severance of the action as to the non-resident defendant Southern Pacific Company, petitioner herein, and, so far as it is concerned, converted said action into a separate action against Southern Pacific Company as effectively as if Southern Pacific Company had originally been made the sole defendant. Thereupon, and promptly after said announcement and before any other step or steps had been taken by petitioner in said action or in defense thereof, your petitioner filed this, its petition for the removal of the action to the proper United States District Court.

In this connection plaintiffs allege that for several days prior to April 19, 1948, their counsel James A. Myers had been in consultation with the defendants' attorney, A. B. Dunne, on at least two occasions concerning the prospect of settlement and also the prospect of having the cases tried on a day certain and as a result of such consultation it was agreed that the consolidated cause could go to trial on April 19, 1948; that at no time up to the time of answering "ready" when the cases were called on said date did said attorney A. B. Dunne



suggest the fact of the death of the defendant E. S. Glanville; that as disclosed by the record of the proceedings, plaintiff's counsel was taken by surprise after he had announced "ready" when the case was called when the defendants attorney thereupon filed a death certificate disclosing that said E. S. Glanville had died in November, 1947, and admittedly so far as said defendant's death is concerned, plaintiffs' counsel had no knowledge of this fact until it was thus disclosed; that after disclosing the fact of the death of said E. S. Glanville defendant's attorney then filed their petition for removal of said cause from the Superior Court of the State of California, in and for the City and County of San Francisco, [58] to the said United States District Court;

### III.

That under the circumstances there could have been no election to proceed against the defendant Southern Pacific Company alone; that as a matter of fact since the removal of said cause, the whereabouts of the defendant H. J. Johnson was ascertained and he was thereupon served with process on May 12, 1948, and that the said H. J. Johnson, a resident of the State of California at the time of the happening of the accident in question, is a necessary and proper defendant in said cause; that in any event the defendant E. S. Glanville having been a necessary and proper party defendant, a resident of the State of California, and living at the time of the service of process upon him and his

subsequent appearance in said cause said defendant Southern Pacific Company acquired no right by the mere fact of his death to have the trial of said cause removed from the Superior Court of the State of California, in and for the City and County of San Francisco, to the said United States District Court. (*Halsey v. Minnesota-South Carolina Land & Timber Co.*, 54 Fed. (2) 933.)

Wherefore, plaintiffs respectfully submit that this Court has no jurisdiction to try and determine this case, and pray that the same may be remanded to the Superior Court of the State of California in and for the City and County of San Francisco from whence it came.

Respectfully submitted,

JAMES A. MYERS,

CLIFTON HILDEBRAND,  
Attorneys for Plaintiffs.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed May 20, 1948. [59]



[Title of District Court and Cause.]

### ORDER DENYING MOTION TO REMAND

It Is Ordered that plaintiffs' motion to remand the above-entitled cause to the Superior Court of the State of California, in and for the City and County of San Francisco, be and the same hereby is Denied.

The record on removal discloses that the only defendants who were served with process and appeared in the state court action were the non-resident Southern Pacific Company and the resident engineer; that prior to the trial date the engineer died, unknown to plaintiffs; that when the case was called for trial and plaintiffs' counsel answered "Ready," defendant Southern Pacific Company's counsel presented to the court the engineer's death certificate, together with its petition and bond for removal on the ground that there now existed a separable controversy wholly between citizens of different states. The case was thereupon removed to this court. While it is unfortunate that plaintiffs were taken by surprise, the fact remains [60] that the resident defendant's death left a controversy solely between citizens of different states, with a consequent right of removal. For this reason the motion to remand is denied.

Dated: June 28th, 1948.

MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed]: Filed June 28, 1948. [61]

[Title of District Court and Cause.]

### VERDICT

We, the Jury, find in favor of the Plaintiffs and assess the damages against the Defendant in the sum of \$1150.00 on behalf of the Plaintiff John Martin Souza etc., in the sum of \$31,047.38 on behalf of the Plaintiff Geraldine Souza et al., and in the sum of \$16,157.38 on behalf of the Plaintiff Josephine Souza, et al.

Dated this 23rd day of July, 1948.

R. R. LOCKHART,  
Foreman.

[Endorsed]: Filed at 7 o'clock and 05 min. p.m.  
July 23, 1948. [62]

In the Southern Division of the United States  
District Court for the Northern District  
of California.

No. 28040-R

JOHN MARTIN SOUZA, LUCILLE SOUZA,  
JOSEPHINE SOUZA, JAMES LAWRENCE  
SOUZA, BENJAMIN SOUZA Minors, by and  
through their guardian ad litem, etc.

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corp.,  
Defendant.

### JUDGMENT ON VERDICT

This cause having come on regularly for trial on July 20th, 1948, being a day in the July, 1948, Term of this Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; James Myers, Esq., appearing as attorney for the plaintiff, and Arthur B. Dunne, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on the 21st, 22nd and 23rd day of July, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was recorded, viz.: "We, the Jury, find in favor of the plaintiffs and assess the

\$1,150.00 on behalf of the Plaintiff John Martin Souza, etc., in the sum of \$31,047.38 on behalf of the Plaintiff Geraldine Souza, et al, and in the sum of \$16,157.38 on behalf of the plaintiff Josephine Souza, et al. Dated this 23rd day of July, 1948 /s/ R. R. Lockhart, Foreman." and [63] the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiffs do have and recover of and from said defendant the sum of Forty-Eight Thousand Three Hundred Fifty-Four Dollars and Seventy-Six cents (\$48,354.76), together with its costs herein expended, taxed at \$153.45.

Judgment filed this 24th day of July, 1948.

/s/ C. W. CALBREATH,  
Clerk.

By /s/ M. R. GRUBIC,  
Deputy.

Entered in Civil Docket July 26th 1948.

[Endorsed]: Vol. 5, page 458, J. D. Filed July 24, 1948. [64]

[Title of District Court and Cause.]

NOTICE ON MOTION FOR JUDGMENT AND  
OF MOTION FOR NEW TRIAL

To the plaintiffs above named and to their attorneys:

You are each hereby notified that on Monday, the 9th day of August, 1948, at the hour of 10:00 o'clock a. m. on said day, or as soon thereafter as counsel can be heard, or at such other time as the Court may fix, if it does fix a different time, the defendant, Southern Pacific Company, a corporation, by its attorneys, will move the above-entitled court, the division thereof presided over by Honorable Leon R. Yankwich, a Judge of the United States District Court sitting in the United States District Court for the Northern District of California, Southern Division, by assignment, at the Courtroom of said court and division in the United States [65] Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, as follows:

I.

(1) Separately and severally as to each of the plaintiffs, each claim, each cause of action, each group of plaintiffs, and all issues and matters touching the claim for damages on account of injuries to John Martin Souza and/or damage to his automobile, the claim for damages on account of the death of Antonio Azevedo Souza and the claim

for damages on account of the death of Edward Anthony Souza, for an order agreeably to Rule 50(b) of the Federal Rules of Civil Procedure, setting aside the verdict and judgment thereon in the above-entitled matter and directing that judgment be entered in accordance with said defendant's motion for a directed verdict heretofore made. Attached hereto, marked "Exhibit A" and herein incorporated is a draft of the order which defendant proposes.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including the transcript of the testimony and proceedings had upon the trial of the above-entitled cause.

(3) Said motion will be made upon the ground that at the close of all of the evidence, the defendant herein made a motion for a directed verdict which should have been granted, but which was denied, and will be made upon all of the grounds heretofore stated as grounds for said motion for directed verdict and will be made upon the following grounds and each of them:

(a) There is no evidence of any negligence [66] on the part of defendant, Southern Pacific Company.

(b) There is no evidence of any negligence on the part of Southern Pacific Company which was a proximate cause of any injury or damage complained of.



(c) It appears as matter of law that the negligence of plaintiff John Martin Souza was the sole proximate cause of any injury and damage complained of.

(d) It appears as matter of law that John Martin Souza was guilty of contributory negligence and it appears as matter of law that such negligence on his part is imputed to the deceased Antonio Azevedo Souza by reason of the provisions of the law of the State of California in such cases made and provided, and particularly §352(b) of the Vehicle Code.

(e) It appears a matter of law that Antonio Azevedo Souza was guilty of contributory negligence.

(f) It appears as matter of law that Edward Anthony Souza was guilty of contributory negligence.

## II.

(1) Separately and severally as to each of the plaintiffs, each claim, each cause of action, each group of plaintiffs, and all issues and matters touching the claim for damages on account of injuries to John Martin Souza and/or damage to his automobile, the claim for damages on account of the death of Antonio Azevedo Souza and the claim for damages on account of the death of Edward Anthony Souza, for an order agreeably to Rule 59 of the Federal Rules of Civil Procedure, vacating

and setting aside the verdict and judgment herein in favor of plaintiffs and granting to defendant, Southern Pacific Company, a new trial. Attached hereto, marked "Exhibit B" [67] and herein incorporated, is a draft of the order which defendant proposes.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including the transcript of proceedings had herein, and all testimony taken on the trial of this case.

(3) Said motion will be made upon the following grounds and each of them severally:

(a) The verdict is against the law.

(b) The verdict is against the weight of evidence.

(c) The verdict is contrary to the evidence.

(d) The evidence is insufficient to sustain the verdict.

(e) The verdict is excessive.

(f) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive the verdict is contrary to the evidence and to the weight thereof.

(g) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(h) Errors of law occurring at the trial and

duly objected and excepted to and particularly in the giving of instructions objected and excepted to and in the denial of defendant's proposed instructions to which rulings defendant duly objected and excepted, and rulings upon the admission of evidence and overruling of defendant's objections to evidence and particularly testimony as to statements alleged to have been made by engineer Glanville after the accident out of [68] which this litigation arises.

A. B. DUNNE

DUNNE & DUNNE,

Attorneys for Defendant, Southern Pacific  
Company.

[Endorsed]: Filed July 31, 1948. [69]

## EXHIBIT A

[Title of District Court and Cause.]

## ORDER

Defendant Southern Pacific Company, a corporation, having duly moved the above-entitled court to vacate and set aside the verdict and judgment herein and render and enter judgment in accordance with its motion for a directed verdict heretofore made herein, and the matter having been heard and submitted to the court, and all of the parties having appeared upon the making and hearing of said motion, and the court having considered the same and being advised in the premises, it is

Ordered, adjudged and decreed that the verdict and judgment herein be, and they hereby are, vacated and set aside and that judgment against the plaintiffs and in favor [70] of defendant Southern Pacific Company, a corporation, that plaintiffs take nothing herein and that defendant Southern Pacific Company, a corporation, do have and recover its costs of suit herein be entered in accordance with defendant's motion for a directed verdict heretofore made.

Done in Open Court this .... day of....., 1948.

.....,

District Judge. [71]

EXHIBIT B

[Title of District Court and Cause.]

ORDER

Defendant Southern Pacific Company, a corporation, having duly moved the above-entitled court to vacate and set aside the verdict and judgment herein and grant to said defendant, Southern Pacific Company, a corporation, a new trial, and the matter having been heard and submitted to the court, and all of the parties having appeared upon the making and hearing of the said motion, and the court having considered the same and being advised in the premises, it is

Ordered, adjudged and decreed that the verdict and judgment herein be and they hereby are vacated and set aside and a new trial of this action is hereby granted to defendant, Southern Pacific Company, a corporation.

Done in Open Court this .. day of .....,  
1948.

.....,

District Judge. [72]

(Affidavit of Service by Mail.)

[Endorsed]: Filed July 31, 1948. [73]

[Title of District Court and Cause.] .

RULING ON MOTION FOR DIRECTED  
VERDICT AND ON MOTION  
FOR NEW TRIAL

I.

The Motion of the defendant Southern Pacific Company, a corporation, for an order under Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the verdict and judgment in each of said consolidated cases, and to direct judgment therein in accordance with the motion of the defendant for a directed verdict, and each of them, is denied.

II.

The Motion of the defendant Southern Pacific Company, a corporation, under Rule 5 of the Federal Rules of Civil Procedure for an order vacating and setting aside the verdict and judgment in each of said consolidated cases, and to grant the defendant Southern Pacific Company, a corporation, a new trial therein, is hereby denied.

Dated this 22nd day of September, 1948.

LEON R. YANKWICH,  
Judge, United States District  
Court.

[Endorsed]: Filed September 22, 1948. [74]



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, defendant in the above-entitled action, deeming itself aggrieved by the judgment in the above-entitled action does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of July 23rd, 1948 herein and the judgment stamped filed on the 24th day of July, 1948, and entered on July 26, 1948, in Volume 5 of the Book of Judgments at page 458 thereof in the office of the Clerk of the above-entitled District Court.

Dated: October 21st, 1948.

A. B. DUNNE

DUNNE & DUNNE,

Attorneys for Southern Pacific Company, a corporation, Defendant and Appellant.

[Endorsed]: Filed October 21, 1948. [75]

[Title of District Court and Cause.]

### BOND ON APPEAL

Know all men by these presents:

That we, Southern Pacific Company, a corporation, as principal, and Indemnity Insurance Company of North America, a corporation, as surety, are held and firmly bound unto John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, Minors, by and through their guardian ad litem, Josephine Souza, Josephine Souza, individually, and Mary Adele Souza and Geraldine Souza, Lawrence Souza and Richard Souza, Minors, by and through their guardian ad litem, H. G. Eastman, plaintiffs above named, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to them, their heirs, executors, successors [76] or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1948.

Whereas, on July 24, 1948, in an action depending in the United States District Court for the Northern District of California, Southern Division, between the above named plaintiffs and the above named defendants, a judgment was rendered against defendant Southern Pacific Company, and said defendant Southern Pacific Company having duly filed Notice of Appeal from said judgment;

Now, therefore, the condition of this obligation is such that if the said appellant Southern Pacific Company shall prosecute its appeal to final effect and pay all costs if the appeal be dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment be modified, then the above obligation shall be void; otherwise to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,  
a corporation, Principal,

(Seal) By LAWRENCE L. HOWE,  
General Attorney.

Attest:

THEODORE WRIGHT,  
Assistant Secretary.

INDENMNITY INSURANCE COMPANY OF  
NORTH AMERICA, a corporation, Surety,

(Seal) By GEORGE L. HOGG,  
Attorney in Fact.

(Verification of Surety.)

[Endorsed]: Filed October 21, 1948. [77]

[Title of District Court and Cause.]

### DESIGNATION OF RECORD

Southern Pacific Company, a corporation, Defendant in the above-entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the Judgment in said action, hereby designates for inclusion in the record on appeal all of the record and records, proceedings and evidence in the above-entitled matter.

Without restricting the foregoing, there is hereby designated for inclusion in the record on appeal all of the [78] matters referred to in Rule 75(g) of the Rules of Civil Procedure and a complete Reporter's Transcript of all proceedings, including all proceedings on motion for new trial and on motion for judgment notwithstanding the verdict and all of the papers and proceedings to the end that there shall be included therein the complete record and all of the evidence and proceedings in the action.

Dated: October 21st, 1948.

A. B. DUNNE

DUNNE & DUNNE,

Attorneys for Southern Pacific Company, a corporation, Defendant and Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed October 21, 1948. [79]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including January 9, 1949, to file the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: November 30, 1948.

MICHAEL J. ROCHE

United States District Court.

[Endorsed]: Filed November 30, 1948. [80]

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[Title of District Court and Cause.)

ORDER

Good cause appearing therefor, it is hereby ordered that defendant and appellant Southern Pacific Company may have to and including the 14th day of January, 1949, within which to file and docket the transcript of record on appeal in the above entitled action.

MICHAEL J. ROCHE,

Judge, U. S. District Court.

[Endorsed]: Filed January 13, 1949. [81]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 81 pages, numbered from 1 to 81, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of John Martin Souza, et al., Plaintiffs, vs. Southern Pacific Company, a corporation, et al., Defendants, No. 28040 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$9.70, and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of January, A. D. 1949.

[Seal]

C. W. CALBREATH,

Clerk.



In the Southern Division of the United States  
District Court for the Northern District  
of California

Before: Hon. Leon R. Yankwich, Judge.

No. 28,040-R (and consolidated cases)

JOHN M. SOUZA, et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-  
tion,

Defendant.

## REPORTER'S TRANSCRIPT

Tuesday, July 20, 1948

Appearances: For Plaintiffs: Hildebrand, Bills & McLeod, by James Myers, Esq. For the Defendant: Messrs. Dunne & Dunne, by Arthur B. Dunne, Esq.

(A jury having been impaneled and sworn, a recess was declared until 2:00 o'clock P. M. of the same day.) [1\*]

Afternoon Session, Tuesday, July 20, 1948  
2:00 p. m.

The Court: Let the record show the jury is in the box. Proceed, gentlemen.

Opening Statement on Behalf of the Plaintiff

Mr. Myers: If it please your Honor, ladies and gentlemen, at this time it is customary for lawyers

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

on both sides of the case to outline to the jury what they expect the evidence in the case to show. And, your Honor, at this time may we ask for an order excluding witnesses from the courtroom? I do not know if there are any here now, but there might be during the time I am making my opening statement.

The Court: Have you any of your witnesses here, Mr. Dunne?

Mr. Dunne: No. I think there are none here. I have no objection to such an order and, moreover, I assume that counsel will want an exception to that in the case of the three people who are here, members of the family. They will be witnesses and they are also parties.

Mr. Myers: There is no one here excepting the parties to the action.

The Court: All right. If any witnesses should come in, if you will call my attention—as you know, gentlemen, I am not very enthusiastic about that rule. I think counsel, with all due respect to their long experience, exaggerate the importance of it. Nevertheless, I grant it or do not grant it, depending [2] on the case. If you both want it at this time, I will grant the rule, and if my attention is called to any witnesses, I will instruct them to go to the witness room. I will make the order.

Mr. Myers: In outlining what we expect the evidence to show in these consolidated cases (the evidence that will be produced applies to all three cases) but in outlining what we expect the evidence in this case to show, of course, His Honor

has stated to you already that anything that the attorneys say in what they expect to prove in their opening statement is not evidence and you will disregard it unless we prove it. So with that in mind I would like to make, with His Honor's permission, a rather detailed statement of what we expect the evidence in this case is going to show.

In the first place, ladies and gentlemen, there are three cases, one brought by the young man who was driving the automobile that was involved in this accident, who received certain injuries that were not particularly serious, but a suit was filed in his behalf so that at a later time, and this is the time, all parties might be before the Court, before you ladies and gentlemen of the jury. So that is one of the cases against the Southern Pacific, the driver of the automobile, a young man by the name of John Martin Souza. At the time of the happening of this accident he was 19 years of age, I believe. He is now 21. He has reached the age of majority, but at the [3] time of the happening of the accident he was 19 years of age.

One of the other cases is one brought by Josephine Souza, who is the surviving widow of Antonio Souza, the father of some of the other plaintiffs in this case. The evidence will show of that union, that is, of the marriage of Josephine Souza and Antonio Souza, there were, I believe, five or six children and all of these children have joined in this action, which includes the minor children as well as those who are adults at the present time. The father was a passenger or was riding

in the automobile driven by one of his sons, John Martin Souza.

The other death was of a young man by the name of Edward, I think it was Edward Anthony Souza. Edward was of the age of 24 years at the time of the happening of this accident. The suit that is being prosecuted for his death is brought by Geraldine Souza, his surviving widow, in behalf of herself and in behalf of her minor children, one children of about four years of age, the other approximately three years of age, and I will go into that particular situation a little later, but I am only outlining now the parties involved. At the time Geraldine Souza brought her action she herself was under age, so that her action was prosecuted by her father, Mr. Eastman, as guardian ad litem, not only for her but for her minor children, the three year old boy and the four year old boy. Those are the three cases that will be tried before you ladies and gentlemen of the jury, and as we proceed I think that you will see that [4] the evidence as it affects all of these cases differs in one respect, that is, from the standpoint of Edward Anthony Souza. I think we will prove that he is in the category of what the law calls a guest passenger. His Honor will explain all of that to you at the proper time, and from the standpoint of a guest passenger different rules of law apply that apply from the standpoint of the driver and Mrs. Josephine Souza and her children.

The Court: Who owned the automobile?

Mr. Myers: The evidence will show that John

Martin Souza, this young man who was driving, was the owner of the automobile involved, but because of the fact that he was a minor, the Vehicle Code of the State of California imputes any negligence, if there was any negligence, on the part of the minor, to the person who signed his operator's license or who allowed him to drive an automobile by his express or implied permission. So in that situation, from the standpoint of Mrs. Josephine Souza and the standpoint of her children, that is, the minor children, as well as the adult children, and from the standpoint of John Martin Souza, the same law applies. The evidence will be, however, that Edward Souza was a guest passenger, as I have previously stated, so that a different rule of law that His Honor will give you applies in that case. In other words, if there was any negligence on the part of the driver of the automobile, that can not be imputed to Edward [6] Souza under the evidence in this case, and consequently Geraldine Souza or her minor children would not be bound by any such evidence. That is the theory of it, ladies and gentlemen.

In going into the facts of the case, the evidence will show that for many years prior to October 11, 1945, Mrs. Josephine Souza and her husband, Anthony Souza, resided in the vicinity of Modesto. I think the evidence will show that Josephine Souza as a young girl was raised in Piedmont over here in Oakland and lived there until she had grown into womanhood, and then went to Modesto and married Anthony Souza, who as



a young man had come to this country, but who had lived in the United States most of his lifetime, I think ever since about 1937 or 1938, somewhere in there. In any event, these people had lived in the vicinity of Modesto and had raised a family, all of these children, some of whom are 20—I think the oldest boy, the one who was killed, Edward Souza, was 24 years of age at the time of his death, and as I say, there were five or six children; they were all born and raised right in the vicinity of Modesto.

Geraldine Souza, the other plaintiff in the other action, was likewise raised in the vicinity of Modesto. I think her father is a post office employee or something there, and she married and they started raising their family in the vicinity of Modesto. [6]

On this particular morning, the evidence will show that Geraldine Souza and Edward Souza, the oldest son, lived on the same ranch, or at least nearby, where the elder Mr. Souza lived, he and his family, and they were all engaged in ranching activities. The elder Mr. Souza had owned and operated a dairy I think on this one ranch for about twenty years. The younger Mr. Souza that was killed in this accident was engaged in, I believe, at that time operating a hay press and was in business for himself. The evidence will show he was supporting his wife, Geraldine Souza, and their minor children by means of his own efforts in these ranching enterprises.

The evidence will show that John Martin Souza, the young man who sits here in court, prior to the



time of the happening of this accident, wanted to lease a ranch that was approximately 11 miles from the ranch owned and operated by his father, the elder Souza, and his father had agreed to go with him over to this particular ranch and look at it, see what its possibilities were. I think it had been a dairy ranch. His father knew all about dairying and he wanted his father's opinion before he himself entered into a lease agreement for the lease of that ranch. So he asked not only his father, Antonio Souza, but also his brother, Edward Anthony Souza, to go with him on this particular morning over some place about northeast of Modesto, about 8 miles, I think, northeast of Modesto, to look at this ranch, and they had agreed the night before that they [7] would go with him and look at the ranch and pass their opinion on it and tell him what they thought of this particular ranch property.

They then left the Souza ranch, which the evidence will show was located approximately 3 miles from the intersection of Beckwith Road and the Southern Pacific crossing. That is approximately two and a half to three miles northwest of Modesto.

John took his automobile and his brother Edward Souza got in the automobile alongside of him. It was a 1941 Ford coupe, I think. Then the father, the elder Souza, got in on the outside of the coupe, and they left home somewhere in the vicinity of 9:00 o'clock, possibly a quarter to nine. I think the accident happened somewhere around 9:02 or 9:05 of that morning.

The evidence will show, ladies and gentlemen, that this was a bright October morning, but that, as usual in that country, there was some ground haze or a sort of mist at that time of the morning that lay fairly close to the ground, but the sun was shining, and having in mind the direction that this car was traveling, in almost an easterly direction towards the railroad tracks, as I have labeled them here, and driving east on Beckwith Road, approaching this crosswalk, the sun was approximately just slightly to the right of the driver's position. In other words, the sun was low in the horizon on October 11, 1945, and [8] was shining right in the direction the car was coming from. So it was shining in Mr. Souza's face as he drove along there.

The evidence will show that in driving from his home to the scene of this accident that he drove approximately 35 or 40 miles an hour. The evidence will show that they had ample time to go over to the ranch. There was no particular reason for being in a hurry to get there or get home again. They were going home to look at this ranch on behalf of this young man, John Souza. The evidence will show that they approached the Southern Pacific Railroad tracks here on Beckwith Road, that there are grapevines, a good many grapevines growing on the righthand side of Beckwith Road before you get to the railroad crossing itself. Now, I do not know what effect the presence of these grapevines had on this accident, if any. I merely mention it to you, ladies and gentlemen of the jury, because I am trying to explain to you the physical characteristics

of this crossing where the accident happened, because I think the evidence will show that it is just about 60 feet from the railroad tracks to the end of those grapevines, and there is a little private road, as I have indicated, that comes in here from the southwest and which goes to a house over in this vicinity, and I put it in because it is there; in any event, there is no question about it, and the evidence will show that the young Mr. Souza was very familiar with this particular crossing, because they lived three miles from there, and before he got to the [9] railroad tracks, he started slowing down. I think he will tell you that he was not going over 15 miles an hour as he left the end of these grapevines that are on the righthand side of Beckwith Road or the south side of it, and that after he left this particular vicinity and proceeded towards the railroad tracks, that he was not going over 15 miles an hour for approximately the first 20 or so feet, and that he slowed down by applying his brakes and came to a complete stop there. He came to a complete stop, I think he will tell you, about 20 feet from the railroad crossing. I think the evidence will show, from the standpoint of his testimony, ladies and gentlemen, that after coming to a complete stop, he looked to his right, which was the direction, the evidence will show, the engine afterwards came from. He looked to his right. There was no engine coming within his line of vision, and I think his vision, he will tell you, with the conditions that prevailed that morning, although it was a bright sunny morning, because

of the ground haze—I think he describes it as a sort of a thin gray mist—that lay in the vicinity of the ground, that he could see distinctly approximately 200 yards to his right. In other words, he had a clear view for 200 yards. The evidence will show that after looking to his right that he then looked to his left, and there was no traffic coming on the railroad tracks from that standpoint; that he listened, he heard nothing; he started his car, and had proceeded in low gear over on the railroad tracks, [10] and when he was astride those railroad tracks he again looked up and here, 50 or 75 feet away from him, or approximately 100 feet, whatever it may have been, was this lone engine, an engine that railroad men call running light, bearing down on him out of the mist, and the evidence will show that he did not see the engine, from the standpoint of his being able to see it because of the mist and the fact that the front of that engine, and we will show you a picture of this engine that was painted like it, was painted a silver-aluminum color, which together with the mist and the sun shining in his face, if it was within his line of vision, that is, within the distance he could see down the tracks, was perfectly and completely camouflaged, so that he did not see it, and he drove onto the tracks and, as I say, when he saw it for the first time it was about 50 to 75 feet away from him, and before he could roll off the tracks, he was still in low gear, the engine struck him.

The impact killed his father, inflicted injuries on him, inflicted such injuries on his older brother that he subsequently died.



The evidence will show without any doubt at all, ladies and gentlemen, that this engine not only was, you might say, completely camouflaged because of the weather conditions, the low-hanging gray mist or haze and silver paint on the front of the engine and the sun shining in between the driver and the engine, it was not only completely camouflaged so he couldn't [11] see it, if it was within his line of vision, but also that he did not hear it, because it was making no noise. The evidence will show that engine was running light, was not working steam, was drifting down at a high rate of speed, and the evidence will show that it was going approximately 70 miles an hour as it bore down upon him.

The evidence will show further that the bell was not ringing and neither was the whistle blowing. The evidence will show, ladies and gentlemen, in short, that what happened in this case actually amounted to murder. That is just plainly speaking, and that is what the evidence is going to show, because of the fact that the employees of the railroad company, the engineer and the fireman, in operating that engine, in running light, not only violated the law from the standpoint of state law in failing to sound a bell and whistle continuously, that is, the bell continuously, and the whistle when within a quarter of a mile of a public crossing, that they not only violated the law there, but they also violated all the rules promulgated by the Southern Pacific Company itself for the operation of its locomotives out on the railroad tracks, and under

such circumstances as these, the evidence will show, I believe, and we expect to be able to prove that the speed restrictions placed by the Southern Pacific itself on a light engine, an engine running light such as this, was 45 miles an hour, and we expect to show from the evidence in this case that [12] if the engineer and fireman had complied with the law, had operated their engine not only in accordance with the law but in accordance with the rules of their own company, this accident would never have happened and Mr. Souza, Sr., and the other Mr. Souza would be here today. In other words, this accident could not have happened.

In putting on that proof, ladies and gentlemen—I mention this because it is going to come out in the proof of the case—the evidence is going to show that after this accident happened, the fireman worked for about two weeks longer for the railroad company, and then for some reason or other he could not be found—in other words, he departed from this state, I think, but in any event, he quit his job. The evidence will show that the defendant Glanville, the engineer Glanville, who is now dead—I believe he died last November, some time such as that—that he and the engineer got their heads together and filed with their company a statement as to how this accident happened, and in that statement the bell was ringing and the whistle was blowing and they were only going 40 miles an hour. I think the evidence is going to show that. Now, the evidence is going to further show that Glanville, the engineer, was served. He appeared in the case but,



as I say, he died, and the case was moved to the Federal Court. That is why it is being heard by you ladies and gentlemen, because of the death of the engineer, who was the only resident defendant in the case. [13]

Before this case was to go to trial here in the Superior Court in San Francisco just a few months ago, the fireman, Mr. Johnston, came out here from Pennsylvania, New York, Chicago or some place where he happened to be—I have forgotten now—but the evidence will show it, in order as he said in his deposition, or at least claimed in his deposition which was taken at my office by Mr. Dunne and me, to right a wrong he had done by filing a wrong report to his company. He wanted to tell the truth about what happened. So consequently his deposition was taken. That deposition will be read to you ladies and gentlemen of the jury as to what his version of this accident is, so that, I believe, we will show not only from the standpoint of the other evidence in the case but from the standpoint of the fireman, the man upon whom the duty devolved to ring that bell and keep the bell ringing, was derelict in his duty and he did not ring the bell. He said he did not ring the bell, and also that the whistle was not blown. That is going to be part of the evidence in this case.

In addition to that, the evidence is going to show that a young man by the name of Warren Davis, who was a ranch worker employed in this locality, was driving in approximately the same direction, an easterly direction towards the railroad tracks, on what is North Avenue or North Road,

and he will be here to testify. His deposition was taken because we felt that maybe he would not be available when the case came to [14] trial, but he is available. He is here and he will testify. I think his testimony will be—

The Court: I do not think it is proper to take seriatim testimony of every witness because it creates confusion in the minds of the jury, and you are telling the story of every witness or the contradiction, which is not proper in an opening statement. Counsel has not objected, but an opening statement should not be of that character. I think you have gone into great detail.

Mr. Myers: Very well, your Honor. I will be glad to abide by your Honor's wishes in the matter.

The Court: It won't do you any good because I will tell them to disregard your statement and not to judge what a particular witness testifies on the basis of that. You can't take the testimony of witnesses seriatim. You have never done it in my court before.

Mr. Myers: That was not the purpose. The purpose of talking about this witness was because of the physical conditions that existed that morning.

The Court: I am not interested in your purpose. You should give an outline and not take up individual witnesses and show how they contradicted themselves and point out that the man had a conscience. Wait until you introduce evidence as to contradictions. That is the point. Otherwise you will be here until tomorrow outlining the case, and it doesn't do a bit [15] of good. Your opening statement is not evidence. You must prove some of these matters.

Mr. Myers: Your Honor, I expect to prove them all.

The Court: That is true, but it is not the proper opening statement, to take seriatim the testimony of every witness. I did not object because I thought you would stop some time, but now you are going into all this detail.

Mr. Myers: I will stop.

The Court: Stop right now. From now on limit yourself to general statements of what the evidence will show, without picking up each individual person, please.

Mr. Myers: Thank you, your Honor. The evidence, ladies and gentlemen, is going to show here at a point approximately four-fifths of a mile from where this accident did happen that the same thing practically happened there. The evidence is going to show that this engine, as far back from Beckwith Road as North Avenue, was not sounding its bell or blowing its whistle and, as I say, that will be established by competent witnesses. In short, the evidence in this case, ladies and gentlemen, will show, I believe, to your satisfaction that this accident was caused solely as a result of negligence on the part of the operators of that engine, employees of the Southern Pacific Company. As a result of that negligence on the part of the operators of this particular engine, Mr. Souza, Sr., who was 57 years old, and his son Edward, who was 24, were killed. [16] The young Mr. Souza, John Martin Souza, was injured.

After putting on that evidence we will ask you, ladies and gentlemen, to bring in a verdict in favor of all of the plaintiffs in this case, a verdict in favor of Josephine Souza individually and in favor of the minor children, for the loss of society, comfort and support afforded to them by the elder Mr. Souza during his lifetime. I will ask you to assess the damages in favor of Geraldine Souza, the younger Mrs. Souza, and the widow of Edward Anthony Souza, for the reasonable value or the pecuniary loss of society, comfort and support furnished Mrs. Souza, Geraldine Souza, and their minor children who are now, I think, between three and four years of age.

The evidence will show in that regard, ladies and gentlemen, that one of the children of the younger Souza's is what is called a spastic, suffering from spastic paralysis, and occasions care on the part of both the mother and father during the father's lifetime. The mother spent her time during the day caring for the children and at night time the father assisted in the care of that spastic child. The evidence will show that that spastic child requires a lot of care on the part of someone. The care afforded to it by the father, as I say, during the night time, during his lifetime, is afforded now by the mother entirely.

Predicating your verdict solely upon the evidence introduced at the trial of this case, we will ask you to assess a [17] substantial verdict in favor of Mrs. Souza, Josephine Souza, for the death of her husband, in favor of their minor children for the death of their father, that is, the elder Mr.

Souza, and a substantial verdict in favor of Geraldine Souza for the loss of her husband, and in favor of her minor children, for the loss of their father, that is, the younger Mr. Souza.

As far as the driver of the automobile is concerned, as I say, his suit was filed in order that all cases might be before you at this time, and his damages under the circumstances or under the evidence that will be proved in this case I think will be fairly nominal. As far as his losses are concerned, I think his major item of loss was his automobile, which is damaged to the extent of six hundred or seven hundred dollars, whatever the allegation is, the evidence will show that he received a concussion and some other injuries, nervous shock, as a result of this, but I believe he was back pursuing his line of activities within two or three weeks after this accident happened. I think that, ladies and gentlemen, substantially covers what we think the evidence in this case will show.

The Court: Mr. Dunne?

Mr. Dunne: If your Honor has no objection, and counsel on the other side has said he has no objection, I should like to use two diagrams in the course of the opening statement.

The Court: Yes. Will they be used in the trial of the [18] case?

Mr. Dunne: They will be used in the trial.

The Court: Suppose we call them Court's exhibits.

Mr. Dunne: I am perfectly willing to introduce them as my exhibits, if your Honor please.

The Court: The evidence has not started. If I



adopt the exhibits as my exhibits—it is understood they are just diagrams.

Mr. Dunne: Yes, your Honor.

The Court: Just call them Court's Exhibits 1 and 2.

(The diagrams referred to were thereupon marked Court's Exhibits No. 1 and 2.)

Mr. Dunne: May I put them up on the board?

The Court: Anywhere you want.

Opening Statement on Behalf of the Defendant.

Mr. Dunne: Ladies and gentlemen, if I may, I want to indicate to you in some measure what we think the evidence will show, not in great detail. Primarily I should like to do two things. Of course you understand I am stating simply what I expect the evidence will show as to some things. In the first place, I want to state those things to you about which there will be no dispute, so that we shall not have any false issues, and then without stating the evidence in detail to you on the other matters, I want to tell you what I think the evidence will show, and where they may be some dispute that [19] perhaps serious disputes as to what happened.

Let me say this to you first so there will be no confusion. We may hear in this case about two types of direction. In the first place, there is geographic direction, and on the upper part of these two diagrams the geographic direction has been shown. Running across the diagram straight are first the railroad tracks and then above them Highway 99, and by comparing them with the arrow



indicating geographic direction, you will see the tracks and Highway 99 going from Modesto, which would be to the right of the diagram, up toward Manteca, Sacramento and San Francisco being to the left of the diagram, run roughly from southeast to northwest. Those are geographic directions. For purposes of railroading, in order to avoid the confusion in giving train orders, the men on the railroad use only two directions. Everything which is a movement, a railroad movement, which if continued will ultimately take a train or engine to San Francisco is called a westward movement. Every movement which would take a train away from San Francisco, if continued, is called an eastward movement, without regard for the geographic direction in that particular place. I do not think there will be much confusion here, however, because roughly what the railroad men call west is northwest and what they call east is southeasterly.

The Court: Let me ask you one question. I happen to know that part of the country. It is my home town. I practiced [20] law there seven years. Was this engine engaged in a westerly movement?

Mr. Dunne: A westerly movement.

The Court: That is going north?

Mr. Dunne: Going northwest from Modesto, that is correct. This particular engine some time early this morning, the evidence will show, had left Fresno and was running light. Counsel upon the other side is correct. There will be no dispute about this. It had no cars attached to it. It was running light. The engine number was 2487. I think both

of us were incorrect in our pleadings in calling it 2478. Nothing will turn on that. It was engine 2487, running light as the second section of Trip 59 from Fresno and going up to Sacramento.

Counsel is also correct in telling the time of the accident. The accident here, as we admitted in the answer, was about two minutes past nine in the morning. It may have been a few minutes after that, but it was from two minutes after nine to five minutes after nine at the time the accident happened.

This general area shown in this top map is approximately four miles from the telegraph office at Modesto and from the edge of the city to Modesto, and I would assume that counsel's statement is correct. It is perhaps two or three miles. He referred to North Avenue. North Avenue crosses the railroad track here and turns into Highway 99. Highway 99, as he [21] endeavored to indicate on the drawing on the blackboard, is a divided highway, two lanes toward the top going northwesterly for northwesterly traffic, and the other two lanes at the bottom for southeasterly traffic. Below that is a line of trees and then the railroad track itself, and then a fence, and we expect the evidence to show, if any question is made about it, that these trees that have been drawn on this diagram were not drawn in haphazardly but were accurately located.

Leaving North Avenue and going northwest on Highway 99, there is a turn in the road known as Vale Road and then as indicated on the map there is another turn into Walnut Avenue. Continuing

on Highway 99 to the left of the diagram in a northwesterly direction, there is a group of devices as shown on that diagram. Those represent a gas station, service station and some houses. That is generally to the east side of the highway. To the left of that diagram, on this side, is Beckwith Road, running almost directly east and west, crossing the railroad tracks at an angle and running into Highway 99. There is indicated alongside the side of Beckwith Road a broken line, which is indicated in the lower diagram, which is intended to indicate a fence line. Counsel correctly stated that along that fence they were growing some grapevines.

The devices here, which would be at the south corner of the intersection of Beckwith Road and the railroad track at Highway 99, are intended to represent the buildings of a ranch [22] or a farm that is located at that point. There is indicated here with the word "Sign" a device which was intended to indicate a large display sign which was located there.

The lower diagram is intended to be an enlargement, on a different scale, of the general area about which I am going to draw in pencil. That area that I have enclosed roughly in pencil is shown on the lower of these two diagrams and again to point out roughly what it is intended to show, it is intended to show the northbound lane of Highway 99, the island between the two lanes, the southbound lane of Highway 99, Beckwith Road, the fence where the grapes were growing, these round dots all indicate poles; these are crossing signs,

cross buck white arm signs at the intersection of the railroad, the base of the device shown on the diagram being intended to show the place where the sign is, of course standing up straight. The two rails of the railroad track, markings on the highway, and the buildings of the ranch or farm that is to the left.

To the top of this diagram is the scale, 1 inch on the diagram equals 100 feet on the ground; and the lower diagram is drawn so that 1 inch on the diagram is intended to represent 20 feet on the ground.

I can go over these things briefly as counsel on the other side went over them. These things probably will be beyond dispute. The locomotive was coming along the track light, as shown upon this diagram, from the right of the diagram to the [23] left of the diagram. There is no question about that. There will be a question as to its speed. Secondly, there will be a question as to whether it did or did not sound the signals. We shall produce evidence that signals were sounded. There is no dispute about the fact of a collision at the crossing.

Before I come to that, let me say some other things as to which there will be no dispute, I believe. There is no dispute about the fact that the engineer of the locomotive was Mr. Glanville. There is no dispute about the fact that Mr. Glanville is dead. Counsel correctly stated that he died last November. There is no dispute about the fact that Mr. Johnston was the fireman, H. J. Johnston, spelled with a "t".

The evidence will show, and I think there will



be no dispute about this, that the engine was running in a forward motion and that when so running in a forward motion the place of the engineer is on the righthand side of the cab in the direction of the motion. The place of the fireman is on the lefthand side of the cab in the direction of motion. There will be no dispute about the fact that the automobile was a 1941 Ford coupe. There will be no dispute about the fact that it was owned by John Martin Souza, the son of one of the people in the automobile and brother of the other, and that at the time of this accident he was about 19 years old. There will be no dispute about the fact that he was driving the automobile. There will be no dispute about the fact that the automobile, [24] as it approached the crossing, was going east on Beckwith Road the the point of the accident. There will be a dispute as to whether it stopped before going onto the railroad track. There will be no dispute about the fact that at this crossing the locomotive struck the automobile, and I think the evidence will show that the locomotive struck the rear end of the automobile or somewhere near the rear end, and the automobile was by the impact thrown over onto the far side of the railroad track, at about where that crossing sign was on the far side, and knocked it down.

There will be no dispute about the fact that the young man who was driving the automobile received some sort of injury. I do not know what those injuries were. I take counsel's word for it that they were unimportant. There will be no dispute about the fact that the father, Antonio Vito Souza,

was killed. I think the evidence will show he was killed instantly as a result of this accident. There will be no dispute about the fact that the brother, Edward Anthony Souza, was injured. I think the evidence will show, if it is of any importance, that he died two days later as a result of this accident. In other words, we are making no dispute about the happening of the accident, that there was a collision between the automobile and the train, nor are we making any dispute about the fact that as a result of this collision two of the people in the car, not the driver, were killed, and that the driver received [25] some slight injury.

We expect to show by a variety of evidence that the train was being properly operated. We expect to show that when the driver of the automobile was at a distance of something over 60 feet, 60 to 70 feet from the railroad track approaching it at such an angle, that he was approaching the locomotive, heading at it, so that he did not have to look away over to his side; that the locomotive was approaching in perfectly clear view and could have been seen if he had looked; that he did not stop before the accident happened but drove right onto the track in the face of an approaching locomotive that was in clear view, and we expect to show that not only was the locomotive properly operated, but we expect to show that that the driver of the automobile was grossly negligent; that he was thoroughly familiar with the crossing, and knew exactly where he was, that there was no confusing traffic, there was nothing else to confuse him, and that he drove right in front of an approaching



locomotive, plainly open to his view, because he was grossly negligent in failing to take any care to see the approaching locomotive. The details of what will appear I do not undertake to tell you. I might misstate them from faulty recollection. They will be told to you by the witnesses and you can hear them just as well as I.

The Court: All right. Call your first witness.

JOHN MARTIN SOUZA,

one of the plaintiffs, called in his own behalf;  
sworn.

The Clerk: Will you state your name?

A. John Martin Souza.

The Court: Mr. Souza, you speak loud enough so that all the persons in the box and counsel on the other side of the room will hear. You will run competition with the street cars, and some carpenters may be hammering, so we will hear everything you say. Have you ever been in a courtroom before?

A. No.

Q. Don't be nervous. Hold your hands like that, that is a good way of avoiding nervousness. Bear in mind that you must not be nervous, or must not be afraid. They will ask questions, and try to answer them so everybody can hear you. If you go to motion picture shows, I will tell you we don't run the way they do in motion pictures. I ought to know, because I come from a town where they make motion pictures. So take it easy and answer the questions as counsel for both sides propound them to you.

(Testimony of John Martin Souza.)

Direct Examination

Mr. Myers: May I ask, Mr. Souza, that you speak loudly enough so I can hear you with my one good ear.

Q. Where do you reside?

A. In Modesto. [27]

Q. Whereabouts with reference to the town of Modesto? A. It is northwest of Modesto.

The Court: On what road?

A. It is on the Toombs Road.

Q. Where is that with reference to Beckwith Road? A. It is north of Beckwith Road.

Q. Whereabouts does that road intersect Beckwith Road with reference to this particular crossing where the accident happened? In other words, how far down Beckwith Road?

A. Say about three miles from the crossing.

Q. How old are you? A. I am 21.

Q. How old were you on October 11, 1945?

A. I was 19.

Q. What was your father's name?

A. Antonio Souza.

Q. How old was he at that time?

A. He was 57.

Q. Your mother was alive, and still is, is that right? A. Yes, sir.

Q. In addition to your mother and father—and I assume you lived with them, did you?

A. Yes.

Q. On a ranch, or what? A. Yes. [28]

Q. What kind of a ranch?

A. A dairy ranch.

Q. How long had you lived on that ranch?

(Testimony of John Martin Souza.)

A. About 18 years.

Q. In addition to your mother and father and yourself, who else lived there?

A. Well, my brother and his wife and two children.

Q. That was Edward? A. Edward.

Q. Edward Anthony Souza? A. Yes.

Q. At the time he was how old?

A. He was 24.

Q. When you say Edward and his wife, you mean Geraldine Souza, the young woman who sits here in the courtroom? A. That's right.

Q. With your mother? A. That's right.

Q. He was your older brother? A. Right.

Q. Besides him, then, what other members of your family resided there?

A. There was a sister, Mary Adele, another sister, Lucille, and two brothers, James and Lawrence.

Q. How old were your two sisters? [29]

A. My oldest sister was—you mean at the time of the accident?

Q. Yes. A. She was about 22.

Q. That is Mary Adele?

A. Yes. The other was about 17.

Mr. Dunne: I am sorry, I did not hear your words. A. The younger sister was about 17.

Mr. Myers: Q. Her name was Lucille?

A. That's right.

Q. The next brother, or the next one, rather, was a brother; is that right? A. James, yes.

Q. How old was James at that time?

(Testimony of John Martin Souza.)

A. 16.

Q. He was 16. Then your next brother, Benjamin, how old was he? A. He was about nine.

Q. All of the ones that you mentioned lived on this ranch approximately three miles down Beckwith Road, but over on this other road?

A. That's right.

Q. On this particular day you were involved in an accident were you? A. That's right.

Q. Were you driving that car at the time?

A. Yes.

Q. What kind of an automobile was that?

A. It was a 1941 Ford coupe.

Q. Were you the owner of that cabriolet coupe?

A. That's right.

Q. In it at the time of the accident's happening was who, besides yourself?

A. There was my brother Edward and my father, Anthony.

Q. Where was Edward seated in the car?

A. He was sitting next to me, on my right.

Q. Who was sitting to the right of him?

A. My dad.

Q. Where had all of you got into this automobile? A. At my home.

Q. Where were you going at the time the accident happened?

A. We were going to look at a ranch.

Q. That ranch was located where?

A. It was located south of Modesto.

Q. South of Modesto? A. That's right.

Q. On Highway 101? A. No.

(Testimony of John Martin Souza.)

Q. I mean Highway 99, I am sorry.

A. No, it wasn't on Highway 99. It was in a southeasterly [31] direction from Modesto.

The Court: What road was that?

A. It was the Claus Road.

The Court: Pardon me. So you will understand, that is my home town. I began practicing law there, and all the roads around Modesto are named, there is the Maize Road, the McHenry Road, and all those which are not part of the highway system have a name, named for some distinguished citizen. In fact, the McHenry Road is named for the McHenry family, one of whose members married the late Judge Langdon, here. My familiarity is due to that fact.

Mr. Myers: Q. From your ranch this ranch is located how far? A. About 11 miles.

Q. How did it happen that your father and your brother were with you on this particular morning?

A. Well, I asked them to go along with me to get their approval.

Q. What were you going to do?

A. I was intending to stock it.

Q. What?

A. It was in Ladina clover, and I intended to stock it.

Q. You were about to stock this ranch?

A. Yes.

Q. Was that a new enterprise with you, or was it something you had done before? [32]

(Testimony of John Martin Souza.)

A. No; it was new to me.

Q. Do you know about what time it was you left your home?

A. It was shortly before nine.

Q. After you left home just tell us the way you used now to get down to the scene of this accident.

A. As I left my home I proceeded south on Toombs Road until I approached Beckwith; then I turned to my left, proceeded easterly on Beckwith Road until I approached the Southern Pacific crossing.

Q. About what time was it that the accident happened?      A. Between 9:00 and 9:15.

Q. As you traveled these three miles on Beckwith Road before reaching the scene of this accident, tell what your maximum speed was that you traveled that morning.

A. Thirty-five or 40 miles an hour.

Q. Had you traveled that speed all the way up to the time the accident happened, or had you varied it?

A. As I approached the crossing I began slowing down.

Q. How far were you from the crossing when you started slowing down?

A. Between 100 and 200 feet.

Q. When you say you approached the crossing, what crossing are you referring to?

A. The crossing of Beckwith and the Southern Pacific.



(Testimony of John Martin Souza.)

Q. Southern Pacific tracks? [33] A. Yes.

Q. That is the crossing where this accident happened? A. That's right.

Q. As you approached the crossing there, is there anything at all on your right as you approach the crossing? What I mean, was there anything growing in the way, trees, or otherwise?

A. Well, there is a row of grape vines on my right.

Q. For what distance, do you know?

A. Well, it ends about 60 feet from the track.

Q. Where were you with reference to these grape vines when you started to slow your car down?

A. When I was about at the end of the grape vines I was going about 15 miles an hour.

Q. The end of the grape vines is about how far from the tracks, themselves, the railroad tracks?

A. Sixty feet, about.

Q. As you continued on 15 miles an hour, what did you do?

A. I began slowing up, I look to my right. There is a private road at the end of the grape vines.

Q. That private road, is that the road that leads to some ranch house? A. Yes.

Q. What was the next thing you did?

A. Well, I was slowing up until I got about 20 feet from the [34] track, and I stopped.

Q. When you stopped your car and you say you were 20 feet from the track, what portion of your automobile are you referring to, the front end, the back end, or middle of it?

(Testimony of John Martin Souza.)

A. It would be the front.

Q. The front end would still be 20 feet, that would be west, from the railroad tracks?

A. Right.

Q. Now, tell us what you did after that.

A. Well, first I looked to my right; then I looked to my left. I didn't see anything, so I shifted into low and I started off.

Q. Then what happened?

A. Well, when I was straddling the tracks I looked to my right again and there was an engine 50 or 75 feet away from me, and I didn't have time for anything else.

Q. How would you describe the front end of that engine with reference to color?

A. Well, the engine was silver in front.

Q. What kind of a morning was it, that is, with reference to climatic conditions, visibility and so forth?

A. Well, it was a cool morning. It was sort of a haze hanging low and I couldn't see any more than about 200 yards down the track, got no clear view.

Q. How about the sun, was it visible?

A. Yes, the sun was visible. [35]

Q. Where was it with reference to you?

A. Well, it was directly, just about directly east of me, maybe a little south.

Q. A little south of east?            A. Right.

Q. How high in the sky was it, I mean with reference to your vision in the car?

A. It was at an angle.

Q. Were the rays showing directly upon the

(Testimony of John Martin Souza.)

top of your car, or was it directly ahead of you?

A. It was shining in the windshield, I could see it.

Q. This haze that you speak of, was that a haze that was something like a fog, or was it something lighter than fog, or—well, describe it.

A. It was lighter than fog, being sort of a haze.

Q. Was your vision affected with reference to the direction you looked? What I mean by that, was there any difference in looking toward the sun or away from the sun?

A. Well, it naturally would distort my vision.

Q. Looking in what direction?

A. When I looked right directly on the sun.

Q. When you looked to the left, how about that?

A. The sun wouldn't hinder me when I looked to my left.

Q. I show you some pictures here. Pardon me, I will show these pictures to counsel first. [36]

The Court: All right.

Mr. Myers: Q. I show you this photograph, Mr. Souza, and ask you what that is.

A. That is a picture of the crossing.

Q. Looking in what direction?

A. That is looking north.

Q. That is a fair representation of that crossing as it appeared on the morning of the accident?

A. Well, it is a little clearer, I think.

Q. It is clearer? A. Yes.

Q. As far as the surroundings are concerned, it is the same? A. Yes.

(Testimony of John Martin Souza.)

Mr. Myers: We will offer this photograph in evidence as Plaintiff's Exhibit No. 1.

(The document was marked Plaintiff's Exhibit 1 in evidence.)

Mr. Myers: Q. I show you this photograph. What is that a picture of?

A. That is another picture of the crossing.

Q. What direction are you looking in that photograph? A. Looking south.

Q. Looking south; that would be looking to your right as you approached the intersection?

A. That's right. [37]

Q. Is that a fair representation of the crossing as it appeared that morning, or is that also clearer?

A. This is clearer.

Q. As far as the physical characteristics are concerned, it is the same in the picture as it was that morning? A. Yes.

Mr. Myers: We will offer that in evidence as Plaintiff's Exhibit next in order.

(The photograph was marked Plaintiff's Exhibit 2 in evidence.)

Mr. Myers: Q. I show you this photograph and ask you what that is a picture of.

A. That is a picture of the private road just before the crossing.

Q. That is the private road that you spoke of at the end of the grape vines?

A. That's right.

Q. That is a fair representation of that, is it?

A. Yes.

(Testimony of John Martin Souza.)

Mr. Myers: We offer that in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted.

(The document was marked Plaintiffs' Exhibit 3 in evidence.)

Mr. Myers: Q. This photograph is a picture of what?

A. That is a picture of the grape vines before you get to the [38] crossing.

Q. Is that a fair representation of the appearance that morning that this accident happened?

A. Yes.

Mr. Myers: I offer that in evidence.

(The photograph was marked Plaintiffs' Exhibit 4 in evidence.)

Mr. Myers: Q. This last one is a picture of what? A. That is a picture of the crossing.

Q. Looking in what direction there?

A. Looking north.

Q. In other words, looking toward San Francisco? A. That's right.

Q. That is a fair representation of the crossing, is it? A. Yes.

Mr. Myers: We will offer that in evidence as Plaintiffs' Exhibit next in order.

(The photograph was marked Plaintiffs' Exhibit 5 in evidence.)

Mr. Myers: Your Honor, may we pass these pictures to the jury?

(Testimony of John Martin Souza.)

The Court: You know, I prefer that be done when you have concluded with the witness, unless you want to propound a question, otherwise we have to stop in the middle of—

Mr. Myers: Very well, your Honor. I just thought that after showing these pictures the jurors might understand the [39] rest of the description where this accident happened.

The Court: If you want to do it now it is all right. I was about to declare a recess. We will have a short recess and before you put the witness on again you may pass these to the jury before you propound other questions. Will it be stipulated the usual admonition has been given?

Mr. Myers: Yes.

Mr. Dunne: Your Honor please, we will stipulate on a running stipulation that it may be deemed given each time the Court adjourns for a recess, and also we will stipulate that the jury, all of the jurors are present unless counsel notes the absence of a juror.

The Court: I will tell you what we will do. Usually, as you know, I give the short admonition, but when we separate for the day I amplify it, but there is no use repeating it when we take a short recess. Step down. We will take a short recess.

(Recess.).

The Court: You may show the jury those pictures before you continue the examination of the witness.



(Testimony of John Martin Souza.)

Mr. Myers: Thank you, your Honor.

(The Exhibits 1, 2, 3, 4, and 5 were passed to the jury for their examination.)

The Court: Proceed now.

Mr. Myers: Q. When you stopped your automobile 20 feet [40] from the crossing, will you tell us whether or not you listened?

A. Yes, I did.

Q. What, if anything, did you hear?

A. I didn't hear anything.

Q. Will you tell us whether or not there was a whistle blowing or a bell ringing on this locomotive?

Mr. Dunne: Objected to as calling for a conclusion of the witness. He can say whether he did or did not hear.

The Court: On a question of hearing, unless we are dealing with a visible sign that he could see, the only way he could tell is what he heard. I think the question should be reframed.

Mr. Myers: Q. Mr. Souza, first, is there anything wrong with your hearing?

A. No, there is not.

Q. On this particular morning immediately prior to the time the accident happened, while your car was stopped at this crossing, will you tell us whether or not there was any bell ringing?

Mr. Dunne: Same objection. He can state whether he heard one, or not.

The Court: Unless a bell is visible, the instrument, itself, is visible, he can't testify whether it

(Testimony of John Martin Souza.)

was ringing or not. He can testify whether he heard it ringing or not.

Mr. Myers: I think, your Honor, that that is a matter of common knowledge, whether a bell is ringing. It does not— [41]

The Court: No, that is not necessarily so. He may have been so inattentive that the bell may have been ringing without his hearing it. He cannot be asked whether it was ringing. He can testify what he saw. If you are asking him about a bell ask him whether he saw the locomotive, and whether he saw the bell, and whether he heard the bell.

Mr. Myers: That would be impossible, to see it, I think, under those circumstances.

The Court: That is true. Then it would be a conclusion. All he can testify is whether he heard it. Unless a thing is visible to the eye, you see; then if it is discernible by another sound, such as the sound of ringing, then the inquiry should be limited to that.

Mr. Myers: Q. First, Mr. Souza, was the window on your side of the car open, or was it closed?

A. It was open.

Q. How about the window on the other side of the car, was it open, or closed, that is, the right-hand side? A. It was closed.

Q. Tell us whether you heard any bell ringing, or whistle blowing immediately prior to the time the accident happened.

A. No, I did not hear anything.

Q. When you looked up and saw the locomotive

(Testimony of John Martin Souza.)

50 to 75 feet away from you, did you hear anything then?      A. No, I couldn't hear anything.

Q. Could you say whether the engine was working steam, or not?

A. I couldn't tell; it was too quick.

Q. While you were at a standstill; in other words, while your car was stopped 20 feet from the tracks, I believe you said you looked to your right. About how long did you spend in looking to the right; just how much time elapsed while you were looking to the right?

A. About two seconds.

Q. I believe you stated you then looked to the left. About how much time elapsed while you looked to the left?

A. About another two seconds.

Q. When you started up to go onto the crossing, you started up, I think you stated, in low gear.

A. That's right.

Q. About how far was your car—I mean how fast was your car moving then while it proceeded from that point 20 feet from the crossing up onto the tracks?

A. About three or four miles an hour.

Q. Then it was after that the collision took place; is that right?

A. I went three or four miles an hour until I reached the tracks, yes.

Q. Then what happened?

A. Then the collision occurred.

Q. Then what? [43]

A. The collision occurred.

(Testimony of John Martin Souza.)

Q. What part of your car was struck; right in the middle, or the back, or the front, or what?

A. Well, it was just in front of the back wheel.

Q. What happened to you then?

A. I was knocked unconscious.

Q. Do you know what happened to the occupants of your car?

A. Well, I learned that my father was killed.

Q. After you regained consciousness tell us, where were you when you regained consciousness?

A. I was lying on the ground.

Q. Where?

A. East of the railroad tracks on the north of Beckwith Road.

Q. Where would that be with reference to the ordinary crossing sign located on that side of the crossing?

A. It would be south of the—you mean the cross arms?

Q. Right.

A. It would be south of the cross arms. The cross arms was knocked down on that side.

Q. When you regained consciousness and you were in that position, did you notice the position of the other occupants of your car?

A. Yes; they were lying on the ground near me.

Q. Was anyone else present there at that time?

A. Yes, there was. [44]

Q. Do you know who was there?

A. Well, there was a crowd of people.

Q. Was there any motorcycle or highway patrol officer there?      A. Yes, there was.

(Testimony of John Martin Souza.)

Q. Then where were you taken?

A. I was taken to the Emergency Hospital.

Q. Was anyone taken to the Emergency Hospital with you?

A. No. I was taken by myself in one ambulance.

Q. How about your brother Edward?

A. He was taken also in another ambulance.

Q. Into the hospital? A. Yes.

Q. You say your father was killed in the accident. You learned that when you regained consciousness? A. Yes.

Q. Your brother, what happened to him?

A. He died two days later.

Q. What injury did you receive in the accident?

A. I received a concussion, which I suffered three or four weeks, and cuts on the right hand.

Q. Cuts on your right hand? A. Yes.

Q. They healed up all right? A. Yes, sir.

Q. Anything else? [45] A. No, sir.

Q. Your nerves have been all right, have they?

A. What?

Q. Your nerves, were they all right?

A. Well, not for about three or four weeks; I suffered shock.

Q. What kind of work were you doing immediately prior to the time the accident happened?

A. I was helping my dad.

Q. What kind of work?

A. Dairy farming.

Q. Then within three or four weeks did you go back to that kind of work again? A. Yes.



(Testimony of John Martin Souza.)

Q. Your automobile was demolished — I will withdraw that. Your automobile was struck by this engine. Was the damage minor, or was it a total loss, or what was it? A. It was a total loss.

Q. How much were you damaged as a result of your automobile damage, what amount of money?

A. \$650.

Q. Do you remember seeing either the engineer or the fireman after the accident that happened?

A. No, sir.

Q. Did you ever see the engineer or fireman after that time? A. I did not. [46]

Q. Not to this day? A. No, sir.

Q. Did you see the engine for a sufficient length of time, a sufficient distance to form any estimate as to the speed it was traveling at the time of the accident? A. No, sir.

Mr. Myers: You may cross-examine.

#### Cross-Examination

Mr. Dunne: Q. Mr. Souza, I assume that you went to high school? A. Yes.

Q. Had you completed high school at the time of this accident? A. No, I hadn't.

Q. What work, if any, up to the time of this accident, had you done?

A. I had just helped my father on the dairy farm.

Q. That was, I suppose, in the afternoon of school days?

A. Well, I helped him after school, yes.

Q. After school, and, I suppose, on weekends?



(Testimony of John Martin Souza.)

A. Yes.

Q. And during the summer? A. Yes.

Q. What day of the week did this accident happen on?

A. I don't recall. I know it was on October 11.

Q. That was Thursday, was it not? [47]

A. I am not sure.

Q. Do you recall whether or not it was a school day? A. No, I don't.

Q. Do you recall whether or not you had not gone to school on that particular day because you were going to look at a ranch?

A. No. I wasn't going to school at the time.

Q. I thought—I may have misunderstood you—I thought you said at the time of the accident you had not finished school.

A. I hadn't finished school. I didn't finish high school.

Q. You did not finish high school. When was it you stopped going to high school?

A. I stopped going to high school in 1943.

Q. You stopped going to high school in 1943. From 1943 to 1945 had you been working?

A. Yes, I had.

Q. And working with your father on his dairy ranch; is that correct? A. Right.

Q. Did he pay you wages for that?

A. Yes; he paid me a slight amount.

Q. Slight amount. Of course, you lived at home?

A. Yes.

Q. When was it that you got this automobile?

(Testimony of John Martin Souza.)

A. I got it about seven months before the accident, on March 3rd.

Q. Had you driven it from March up to the time of this accident? [48]

A. Yes, I had driven it.

Q. Had you driven it in to Modesto?

A. Yes.

Q. Had you driven it along Beckwith Road toward this crossing? A. Yes, sir.

Q. And over this crossing? A. Yes, sir.

Q. A great many times?

A. Quite a few times.

Q. About how often a week would you go down Beckwith Road and over this crossing?

A. About three times a week.

Q. Then you knew where the crossing was?

A. Yes, I did.

Q. You knew about how far it was from where Toombs Road turned into Beckwith crossing; is that correct? A. Yes.

Q. You had no operator's license, did you?

A. No, I did not.

Q. Did you make an application for an instruction permit in March when you got the automobile?

A. No, I did not.

Q. Did you ever make such an application?

A. Yes, I did.

Q. When did you make it? [49]

A. It was when I was about 17.

Q. That was the only one you ever made?

A. That's right.

Q. So at the time of this accident you had

(Testimony of John Martin Souza.)

neither an operator's license nor a running permit, did you?

A. I don't think my permit was still in—

Q. No. Those are good only for 90 days, aren't they?

A. That's right.

Q. Did your brother know that, your brother Edward?

A. Yes, he did.

Q. When was it that you first became interested in taking over or doing something to another ranch, or dairy?

A. About six months before the accident.

Q. Was that this same ranch or dairy that you were going to see on this day?

A. Well, I didn't know anything about it six months before.

Q. You were going to a particular ranch or dairy on the day of this accident, were you not?

A. That's right.

Q. So we can define it, did it have a name?

A. I don't know if it did or did not.

Q. Was it at the so-called Dry Creek—

A. It was somewhere near there.

Q. I don't say that this is the right name of this particular ranch, but let's just say we can call it that in order to know [50] we are talking about this particular one, let's call it the Dry Creek Ranch. When did you first become interested—

The Court: Dry Creek is a dry creek that runs through a lot of ranches.

Mr. Dunne: I am just using that name.

The Court: It is a dry creek.

(Testimony of John Martin Souza.)

Mr. Dunne: Is there any way we can identify this ranch? Who owned this property?

A. I don't know.

Q. You don't know whether it had a name?

A. I don't know.

The Court: Well, I may inform you that those places, those ranches up there, small ranches because of the intensive agriculture that goes on, and in the olden days they had names. Now they are not named, unless you have a large place. What they call a ranch does not exceed 20 to 40 acres. It is not like in Southern California, where the ranches run into thousands of acres.

Mr. Dunne: Just so we won't confuse this ranch or dairy which your father owned then, the one to which you were going I will call the Dry Creek Ranch. When had you first become interested in that?

A. I just read an advertisement in the paper on the night before.

Q. The night before. What was it that you had in mind to do with it, operate it as a dairy, or what were you going to do? [51]

A. I wanted to stock it with beef.

Q. That would be beef for slaughtering and sale in the butcher shops?

A. Right.

Q. Had you discussed that with your father the night before?

A. Yes. [51-a]

Q. And had you discussed it with your brother Edward the night before?

A. I don't recall if I had or not.

(Testimony of John Martin Souza.)

Q. You did not have the money, of course, to buy the beef, did you?

A. No, I didn't have enough.

Q. Was your father going to assist you in that?

Mr. Myers: I am sorry, Mr. Dunne, I can't hear you.

Mr. Dunne: I will stand over here. Maybe we can do better.

The Court: Unless you examine him as to a document, it is better to stand over there.

Mr. Myers: Mr. Reporter, will you read that last question?

(Record read.)

The Witness: Well, I had a few head of stock and I meant to start out with those.

Mr. Dunne: Q. Was your father going to give you his help? A. Well, maybe later on.

Q. At that time what was the business, if anything, or occupation of your brother Edward?

A. He was operating a hay press.

Q. Where was he operating that?

A. Well, right in that vicinity.

Q. Did he have the hay press that he would go around and press [52] hay for anybody who wanted it done? A. Yes, he did custom pressing.

Q. He would go around from place to place?

A. That is right.

Q. He was not operating any ranch of his own?

A. Well, he had a ranch, yes, he did.

Q. Where was this ranch?

A. His ranch was on the road called Dunn Road, which was north.

(Testimony of John Martin Souza.)

Q. You were about to say it was north of some place? A. It was north of my father's place.

Q. What kind of ranch was that?

A. It was an alfalfa ranch.

Q. Did he run any stock on that?

A. No, he did not.

Q. When did you first discuss with your brother Edward going down to see this ranch?

A. The morning of the accident.

Q. Will you tell us as near as you can remember it what the conversation was that you had with your brother?

A. Well, I can't recall too well. It has been quite a while.

Q. I know, we do not expect you to remember it word by word. We know that that could not be done. But tell me as best you can the substance of what that conversation was with your brother. [53]

A. Well, we were discussing the different markets and how they would be for beef and the possibilities of how many stock the ranch could hold, how good the clover was on the ranch.

Q. Anything else that was said?

A. I don't recall—rent, the amount of money it would take to operate the ranch.

Q. You talked that over with your brother?

A. Yes, sir.

Q. Did you ask him to go down there with you?

A. Yes, I did.

Q. What did you say about that?

A. What did I say about it?



(Testimony of John Martin Souza.)

Q. Yes, what did you say to your brother about going down there with you?

A. Well, I asked him if he would like to come along.

Q. Did you say anything else to him?

A. I don't remember if I did or not.

Q. Did you say you would like to come along to look it over so you could have his opinion on what he thought about it?

A. Yes, sir.

Q. And did he agree to do that?

A. Yes, he said he would.

Q. Did you talk to him about his helping you out, putting any cattle on that ranch? [54]

A. No, I did not.

Q. Did you talk to him anything about what he was going to do on that ranch?

A. No, I did not.

Q. Did you talk to him about any assistance that he might give you with his hay press or any other way?

A. No, I didn't expect him to give any help with the hay press because there wasn't any hay on this ranch.

Q. Can you remember anything else about that conversation that you had with your brother?

A. No, I can't.

Q. As I understand it, you left your father's home somewhere before 9:00 o'clock on the morning of this accident, is that correct?

A. That is right.

Q. Mr. Souza, before I show you these pictures,

(Testimony of John Martin Souza.)

just one other question so I will be clear about it: On this particular trip, the objection of this trip was to look over a ranch that you were contemplating renting, is that correct?

A. That is correct.

Q. And you took your father and brother along with you so they could look it over with you and you could have their advice?

A. That is right.

Q. I am going to show you here some pictures, one at a time, and you will notice that I put some ink notations at the [55] bottom of it in each instance, the date. They are supposed to have been taken on the day of the accident in the afternoon, and the distance that the camera was from various points, and I will point that out to you, and the direction in which the camera was facing. I want to show you this one and ask you if you recognize that.

A. Yes, I do.

Q. That one, Mr. Souza, if I may step up here by this diagram, is taken looking down Beckwith Road toward the railroad track, is it not?

A. That is right.

Q. And it shows on the righthand side a railroad warning sign, does it not?

A. That is right.

Q. Do you recognize that sign as being there at the time of the accident?

A. I don't recall if it was there or not at the time of the accident.

Q. Did you see it the morning of the accident?

A. I might have seen it. I don't recall if I did or not.

(Testimony of John Martin Souza.)

Mr. Dunne: I will offer this as our first exhibit in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Dunne: Q. What was it that first attracted your [56] attention, brought it to your attention that you were approaching, that you were getting into the neighborhood of the railroad track?

A. I could see the railroad track from about 100 feet or 200 feet back.

Q. Could you see the white cross arms?

A. I don't recall if I could or not.

Q. There were two of them there before the accident, were there not?

A. I think there were.

Q. Do you recall seeing either of them at any time before the accident?

A. I don't recall if I did or not.

Q. Do you know whether or not you were as far back as this advanced highway sign at the time you first saw the crossing? Take the picture so you can see what I am talking about.

A. No, but I knew the railroad was there. I didn't have to see it.

Q. See if you can answer my question. Were you that far back when you first saw the railroad?

A. I don't think I could see it from this far away.

Q. Can you tell me by any physical objects on

(Testimony of John Martin Souza.)

the ground where you were at the time you first saw the railroad?

A. About 75 or 100 feet from the track I could see the tracks.

Q. I am asking you if you can tell me by reference to any [57] physical objects on the ground whether it is a fence or a building or a telephone pole or a house where you were when you first saw the track?

A. There was a row of grape vines on the right.

Q. You could see over those, couldn't you?

A. Well, they are pretty high.

Q. Answer my question: You could see over those, couldn't you?

A. I am not sure if I could or not. They were clipped shortly after the accident.

Q. Let me show you another photograph and ask you if this is a correct photograph looking down Beckwith Road the way you were going toward the crossing for about 300 feet from the crossing.

A. You say this is 300 feet from the crossing?

Q. Yes, the camera was 300 feet from the crossing.

A. I could see the cross arms from here. It shows it in the picture.

Q. Could you see it on the morning of the accident from there?      A. Yes, I think I could.

Mr. Dunne: We will offer this in evidence as our next exhibit in order.

The Court: It may be received.

(Testimony of John Martin Souza.)

(The photograph in question was thereupon received in evidence as Defendant's Exhibit B.) [58]

Mr. Dunne: Q. I will show you another one taken 300 feet from the crossing, and looking now not straight down the road, but looking a little bit to the right in the way you were going, which would be down toward Modesto, down toward the south, and ask you if that is the way conditions were on the morning of the accident.

A. I don't believe this shows any mist or haze.

Q. We will come to that. Let us take the physical objects so far as road, poles—

A. They were the same.

Q. I am going to call your attention to one particular thing. I have my finger just to the side of an object which shows beyond a tree. Can you tell me what that is? A. No, I can't.

Mr. Dunne: I will offer this as our next exhibit in order.

Mr. Myers: What was the answer?

Mr. Dunne: "No, I can't."

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Mr. Myers: For the purpose of the record, what were you referring to?

Mr. Dunne: I was referring to the edge of the Valley Brew sign.

Q. I will show you two photographs, the first

(Testimony of John Martin Souza.)

one looking [59] right down the road, and the camera in that one was 200 feet from the track. Do you recognize that as showing the physical objects that were there? A. Yes, sir.

Q. You will see across the track and what looks to be across the highway, a building. What building was that? A. A gas station.

Q. Did you ever see the gas station on the morning of this accident?

A. I don't recall if I did or not.

Mr. Dunne: I will ask this be marked as our next exhibit in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit D.)

Mr. Dunne: Q. This one, the camera was 200 feet from the track, but to the lefthand side of the road, in the direction that you were going and again looking off southeast a little bit off to the right from where you were going, and ask you if that shows physical objects which were there.

A. Yes, sir.

Q. Do you see a sign off in the distance in that picture? A. Yes, sir.

Q. What sign is that?

A. It is a sign on the road, Valley Brew sign.

Q. An advertising sign, a billboard sign? [60]

A. Yes.

Q. Did you see that on the morning of the accident?

A. I don't believe I looked at the sign. I just looked down the track.



(Testimony of John Martin Souza.)

Mr. Dunne: I am going to ask that this be marked as our next exhibit.

The Court: It may be received.

(The photograph in question was thereupon received in evidence and marked Defendant's Exhibit E.)

Mr. Dunne: Q. And another one looking in the same general direction but this time beginning 125 feet from the tracks. Does that correctly show the physical objects, the poles, trees, vines, Valley Brew sign, and other things of that sort?

A. Yes, it does.

Mr. Dunne: We will offer this in evidence as our next exhibit.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Mr. Dunne: Q. I am going to show you another one purporting to be taken with a camera at 75 feet from the railroad track looking down Beckwith Road and ask you if that correctly represents the physical objects that were there with one exception: the cross arm sign on the far side of the track.

A. Yes.

Q. Before the accident there were two cross arm signs, were [61] there not? A. Yes, sir.

Mr. Dunne: We will ask that this be marked as our next exhibit.

(Testimony of John Martin Souza.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit G.)

Mr. Dunne: Q. And another one taken from the same point, 75 feet back from the track, looking down now along the track: Does that correctly show the physical objects with the exception of a train which is shown in the distance in that picture? With that exception does it show the physical conditions on the morning of the accident?

A. It shows the physical conditions, yes.

Q. How about that train? Could you see a train that far away?

Mr. Myers: When, counsel?

Mr. Dunne: The morning of the accident.

Mr. Myers: That is objected to, your Honor, unless the distance is specified as to how far the train is from the crossing.

Mr. Dunne: I do not know. That is the reason I want to ask the witness, if he could see a train in that locality.

Mr. Myers: It is impossible to tell from a photograph, counsel. You know that.

The Court: The inquiry is addressed to the witness. He is asking him. [62]

The Witness: I don't know if I could tell or not. I don't know how far the train is.

The Court: That is the answer.

Mr. Dunne: I offer this as our next exhibit in order.

(Testimony of John Martin Souza.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit H.)

Mr. Dunne: Q. This next one shows the same thing, does it not, with the train closer to the crossing? A. Yes, it does.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Mr. Dunne: Counsel, I won't put that in unless you want it. I do not think it helps anything.

Mr. Myers: It is your picture.

Mr. Dunne: You can have it if you want it. I do not think it aids anything.

May I, Mr. Clerk, see the plaintiff's exhibits? I do not want to duplicate them unnecessarily.

Q. I show you one more, which is like two of those which counsel showed you, with the exception that they are taken a little farther back, and ask you if that correctly represents a view down the railroad track looking in the direction in which the train is coming, with the exception that one cross arm sign has been knocked down.

A. The train was not coming from that direction. That is [63] looking north.

Q. That is right. The train was going north, wasn't it? A. It was going north, yes.

Q. So that is looking in the same direction the train is going? A. That is right.

Q. The way people looking ahead on the engine

(Testimony of John Martin Souza.)

or the train would look? A. That is right.

Mr. Dunne: I will offer that as our next exhibit.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit J.)

Mr. Dunne: Q. As you left home that morning, how far was it from the place where Toombs Road turns into Beckwith Road?

A. I don't know the exact distance. Between 1/8 and a quarter of a mile.

Q. How fast did you drive down that?

A. Not very fast, about 30 miles an hour.

Q. And then you turned left into Beckwith Road? A. That is right.

Q. About three miles from the railroad track, is that correct? A. That is right.

Q. Is Beckwith Road straight down to the railroad track? A. Yes, it is.

Q. A two-line highway with lanes marked, with a divided mark [64] in the middle?

A. That is right.

Q. As you went down Beckwith Road toward the railroad track, how fast were you traveling?

A. About 35 or 40 miles an hour.

Q. What were you and your brother and father doing as you drove along Beckwith Road after you turned in from Toombs Road?

A. We discussed this ranch for a short time.

Q. When did that discussion cease?

(Testimony of John Martin Souza.)

A. About a half mile or a mile before we got to the tracks.

Q. How do you fix that distance at a half mile or a mile?

A. What do you mean, how do I fix that distance?

Q. How did you know you were a half mile or a mile from the tracks when that conversation ceased?

Mr. Myers: That is argumentative.

The Court: It is permissible. It is cross-examination.

The Witness: Well, it was a few minutes before the accident, about five minutes.

Mr. Dunne: Q. About five minutes?

A. Probably less. I am not sure.

Q. What is your best estimate of that time?

A. I don't know. Between three and five minutes, maybe less.

Q. You think it took you from three to five minutes, at 40 miles an hour to travel from a half mile to a mile?

A. It would take less, naturally. [65]

Q. What now is your best estimate or have you any recollection? Mr. Souza, if you do not have any recollection, don't hesitate to say so.

A. No, I don't know for sure.

Q. Do you have any clear recollection of how far you were from the crossing at that time?

A. You mean when we ceased talking?

Q. Yes.

(Testimony of John Martin Souza.)

A. I knew we were quite a ways back because we didn't talk at all, very little, from the time we left.

Q. You spoke of a fence that was on your right where grape vines were growing. How far back from the track along Beckwith Road does that fence with those vines over it extend?

A. It runs back two or three hundred feet, maybe more. I don't know.

Q. What?

A. Maybe more. I don't know for sure.

Q. What is your best estimate of that?

A. Around 300 feet.

Q. I show you this picture, Defendant's Exhibit

A. That seems to indicate that it ends, and that there is a road off toward the right just before that crossing sign.

A. That is right.

Q. Does it extend farther back from the railroad tracks than that or is that the place where it ends?

A. That is where it ends.

Mr. Myers: What is that distance, counsel?

Mr. Dunne: 600 feet.

Q. And your estimate of that is two to three hundred feet, is that correct?

A. I wasn't sure. I just guessed at it.

Q. I know, but I want your estimate of distance. Your estimate of that distance was two to three hundred feet?

A. That is what I guessed it at, yes.

Q. You gave us some other distances here on direct examination. Are they just guesses or are



(Testimony of John Martin Souza.)

they estimates, the same as this one, or guesses the same as this one?

Mr. Myers: Your Honor, that is not proper cross-examination. The witness has estimated, given his best judgment as to distance, and I do not think it is fair to ask him a question such as that.

The Court: I wouldn't use that word "guess". I think the form of the question is objectionable.

Mr. Dunne: I used it only because the witness used it, your Honor.

The Court: I think it should be reworded asking him if he is certain or if it is merely an estimate.

Mr. Dunne: Q. These other distances that you gave, are they merely estimates?

A. Most of them are estimates, yes. [67]

Q. Let me ask you this. Will you estimate for me, your best estimate now, the distance that the Valley Brew sign is from Beckwith Road at the crossing?

Mr. Myers: Just a minute, your Honor, before the witness answers that question.

Mr. Dunne: It shows in Defendant's Exhibit B. [68]

Mr. Myers: That is objected to as incompetent, irrelevant and immaterial. I don't know what a sign has to do with this question. It is a sign sitting there in the field away from the crossing.

Mr. Dunne: I want to test the witness' capacity to estimate distances.

Mr. Myers: He may not have paid any attention to that sign. There is no reason why he should pay attention to that sign.

(Testimony of John Martin Souza.)

The Court: You know, Mr. Myers, it is very important to exchange—I address both counsel, I think you should desist in engaging in the side comments. Kindly address your objections to the Court and I will rule on them. When you are talking to each other I don't know what you are doing, whether you are just exchanging views, or whether you are asking me to rule on something.

Mr. Myers: Your Honor, I am sorry; that is true. With reference to this last question that was asked on Defendant's Exhibit F, that is objected to on the ground it has nothing to do with the happening of this accident. He is asking this witness to estimate the distance of that sign that is located back of the crossing out in a field, and that has nothing to do with the accident, at all.

The Court: I think the conduct of this witness, who was the driver of the car, at or about—the attention, the observation, [69] what he was doing, whether he was watching the road, whether he was talking to someone is all a proper subject of inquiry for the purpose of his alertness, whether he has his mind on the wheel, or the road, or whether he was talking to somebody else, and what he saw or did not see.

Mr. Myers: That is just the point. Looking at a sign out in the field away from where he is going would show that he was not alert, that he was not looking where he was driving. That is the point. There was no evidence he even saw the sign on the morning of the accident.

The Court: He is not required to take the

(Testimony of John Martin Souza.)

witness' statement on that. He is not his witness. He has a right to test the verity of his statements, by asking him things which might detract from his statement.

Mr. Myers: Your Honor, I agree with your Honor, but my point is there is no evidence yet that this witness saw this sign, at all, and he is asking—he is predicating his question on that ground.

The Court: Mr. Myers, you know I seek to avoid any statement in the course of the trial which might lead the jury to infer that I expressed an opinion as to the facts. You have tried at least one case before me, and Mr. Dunne has tried several, and other members of your firm have tried many of them before me, both here and in my own district, both the Northern District and Southern District, and you know [70] I try to avoid making any comment that might lead the jury to believe I expressed an opinion as to the facts. I could give you a perfect answer to your statement, but I don't choose to. I merely say whether he saw it or not is a proper subject of inquiry. Suppose he did not see it? It is a subject of argument whether if he had looked he would have seen it.

Mr. Myers: Well, will your Honor look at the exhibit?

The Court: No, I am not going to do that.

Mr. Myers: I will submit the matter.

The Court: The witness knows the crossing better than we do. He was there.

Mr. Myers: That is not the crossing—

(Testimony of John Martin Souza.)

The Court: It is at or about. You are not limited to the locale of the crossing. I want to assure you this is not the first crossing case I tried. I think it is the eleventh or twelfth that I have tried in the last few years. The last one I tried was in Fresno in March of this year, so I have some familiarity with the rules which apply to the scope of inquiry. All I am saying is this, that the defendant has a right to examine the witness as to all the objects which are around and about the crossing within a reasonable distance, before or after or around it on that morning, and it was not dark, although you said in your opening statement it was hazy. Well, there has been no evidence, so anything that was visible [71] or about, at or near the crossing is a subject of inquiry.

Mr. Myers: Your Honor, I am sorry, but this witness has testified already that it was hazy that morning, that there was a ground haze. That was on direct examination.

The Court: All right.

Mr. Myers: I am sorry, but that was it.

The Court: That may have slipped. All right. Then he has a right to find out how hazy it was, whether he could see things.

Mr. Myers: Very well.

The Court: Let's find out.

Mr. Dunne: I think I can recall the question.

Q. What is the best estimate of the distance the Valley Brew sign is from the crossing of Beck-with Road and the railroad track?

(Testimony of John Martin Souza.)

A. Somewhere in the vicinity of 600 feet, I would estimate.

Q. That is your best estimate. As you drove down Beckwith Road toward the crossing, was there any traffic on Highway 99?

A. I don't recall.

Q. As you drove down Beckwith Road toward the crossing at any time before the accident was anybody over at the service station?

A. I don't recall that.

Q. Did you look?

A. I did not look at the service station, no. [72]

Q. As you drove up Beckwith Road, how far from the railroad track were you when you first slowed down from 40 miles an hour, or whatever the speed was that you had been traveling?

A. I would say about, around 200 or 300 feet; maybe less. That is my estimate.

Q. Did you use the brake in slowing down?

A. No. I just took my foot off the accelerator.

Q. At what speed were you going at the time you passed beyond the grape vine hedge to your right?

A. About 10 or 15 miles an hour.

Q. Was there any traffic ahead of you on the Beckwith Road?

A. No, there was not.

Q. As far as you know, was there any traffic behind you?

A. I don't know.

Q. Was there any traffic after you were within 200 feet of the railroad tracks, was there any traffic on Beckwith Road going in the other direction?

A. I don't recall; I don't think there was.



(Testimony of John Martin Souza.)

Q. Did you have a radio in that car?

A. Yes, I have.

Q. Was it on or not?           A. No, it was off.

Q. At no time until you got on the railroad tracks did you see any train or locomotive; that is correct, isn't it?

A. Not until I got on the track did I see it. [73]

Q. You got on the tracks. What position was your automobile on the tracks when you first saw the railroad locomotive?

A. Well, I was straddling, almost straddling the tracks.

Q. Is it fair to say that the center of your car was about over the center of the tracks?

A. No, I wouldn't. I would say it was just a little over, more toward the front than the center.

Q. You then looked and for the first time saw that railroad locomotive?           A. Right.

Mr. Dunne: Did your Honor indicate you wanted to adjourn?

The Court: Well, I wanted to reach—you know, I usually don't look at the clock, but many of these jurors live across the bay.

Mr. Dunne: Yes, your Honor.

The Court: And I try, if I work long hours I try to do it at noon rather than in the afternoon. I was trying to find a stopping point.

Mr. Dunne: I can suspend now.

The Court: If it is all right. I know you probably cannot finish with the cross-examination.

Mr. Dunne: I cannot.



(Testimony of John Martin Souza.)

The Court: As you know, ordinarily I don't like to break the continuity of an examination or cross-examination, because many times it is in the interest of the proper presentation [74] of the case to continue with the examination and not to break it off, especially when we adjourn until the following morning. I may say that after 21 years as a judge I still am not a whistle man, but I am taking into consideration all the circumstances of the case, and your needs, and if I run over it is merely because I feel that the particular situation requires it. As long as we cannot finish with this witness there is no use to disorganize your plans and your transportation methods by running over, because this case will take several days.

Step down, Mr. Souza.

Ladies and gentlemen, we are about to take an adjournment until tomorrow morning at ten o'clock. The court instructs you not to converse among yourselves, or with anyone else on any subject connected with this trial, or to form or express an opinion thereon until the case is finally submitted to you. You are just hearing the first witness giving his version of the accident. You may gather from the statements of counsel that there probably will be contradictions in the testimony as to what exactly took place at the crossing. It will be up to you to determine the facts in the case, as I informed you when you were examined, and it is very important that you keep an open mind until you have heard all the testimony relating to the particular incident, and much more important until

you have heard the instructions [75] on the law to be given you by the judge of this court, and, incidentally, if you have been wondering what I was doing here, well, I am working on the instructions to be given to you when the testimony is concluded, and until you have those you won't have the touchstone upon which to assay the facts; so keep your minds open as to anything you hear until all the evidence is in and the case is submitted to you. When you come in the morning you go into the jury room and remain there until we call you.

(The trial was then adjourned until tomorrow, Wednesday, July 21, 1948, at ten o'clock a.m.) [76]

Wednesday, July 21, 1948, 10:00 o'Clock A.M.

The Clerk: The case of Souza vs. Southern Pacific Company, on trial.

Mr. Myers: Ready.

The Court: Proceed.

JOHN MARTIN SOUZA,  
recalled, and having been previously sworn, testified as follows:

Cross-Examination——(Resumed)

By Mr. Dunne:

Q. Mr. Souza, your automobile was a 1941 Ford coupe?      A. That's right.

Q. Was it a big Ford or a little Ford?

A. It was an 8.

Q. An 8. How many seats did it have?

A. One seat.

(Testimony of John Martin Souza.)

Q. One seat? A. That's right.

Q. That was the seat that the driver sat on?

A. That's right.

Q. Did it have any short seat in back of it?

A. No.

Q. Then the seat backed right up against the back of the car? [77]

A. Well, there was a small space in back of the seat, between that and the rear window.

Q. Did that go down to the floor where you could put bags? A. No.

Q. Just a shelf? A. That's right.

Q. Did it have a divided windshield?

A. Yes.

Q. How did the doors open, were they hinged to the front of the seat, or the windshield, or in back?

A. At the front.

Q. Then over on the right-hand corner where the door hinged there was a post, was there not?

A. Yes, there was.

Q. And right over at that angle, looking there, there was a blind spot when you were driving, wasn't there?

A. At times it would be.

Q. You were in the front seat behind the wheel?

A. That's right.

Q. At the time of the accident, and your brother was in that same seat next to you?

A. That's right.

Q. And your father, then, was in that same seat to your brother's right? A. That's right. [78]

(Testimony of John Martin Souza.)

Q. You told us yesterday, and I will ask you if it is correct, that your automobile was over the rails of the track straddling the track, when you first saw the locomotive.

A. When I first saw it, I would say the front wheels were over, getting over the tracks.

Q. What part of the locomotive did you see at that time?

A. I just seen the front end of it.

Q. After you stopped and started again, were you looking ahead in the direction in which you were driving?

A. After I started, yes, I was looking ahead.

Q. Did you, up until the time that the locomotive struck the automobile, ever hear the locomotive?

A. No, I did not.

Q. Did you hear any whistle?

A. No, I didn't hear a whistle.

Q. Did you hear any bell?

A. No, I didn't hear a bell.

Q. Did you hear any other noise from it?

A. No, I did not.

Q. Did you hear any rumbling of the wheels?

A. No, I didn't hear anything.

Q. Did you hear any rumbling of rails?

A. No, I didn't.

Q. You heard no sound at all?

A. No, I didn't hear any sound of the train.

Q. When you were stopped 20 feet from the track and looked to your right, did you look through the side window, or through the windshield?

A. I don't remember.

(Testimony of John Martin Souza.)

Q. When you were astraddle of the track and looked at the locomotive, did you look through the windshield, or through the side window?

A. Through the side window.

Q. What made you look to your right through the side window?

A. I don't know.

Q. It is possible that it was some noise from the locomotive?

A. It might have been, I don't know.

Q. Is it possible it was a whistle from the locomotive?      A. I don't think so.

Q. But you are not sure?

A. No, I am not sure.

Q. As you were approaching the crossing before you had come to a stop did you look to your left?

A. When I was stopped I looked to my left, yes.

Q. When you looked to your left, were you able to see down the railroad track to your left?

A. Yes, I was.

Q. How far?

A. I would say about 200 yards. [80]

Q. To your left?      A. That's right.

Q. The same distance to your right?

A. That's right.

Q. Had you done any work at your father's dairy on this morning before you left?

A. Yes, I had.

Q. What had you done?

A. I had helped him milk the cows.

(Testimony of John Martin Souza.)

Q. At about what time had you started in at that work? A. About 5:30.

Q. Was it dark at that time?

A. I don't remember if it was, or not.

Q. What time did it get light, do you remember?

A. I don't remember.

Q. Can you give us any idea, at all?

A. It might have got light, maybe at 5:30 or 6.

Q. That is your best recollection now?

A. That's right.

Q. You told us when you stopped you could see to your left 200 yards and you could see to your right 200 yards. Upon what do you fix that estimate? A. You mean the distance in feet?

Q. Yes. You said you could see to the left 200 yards and to the right 200 yards. Upon what do you fix that distance? [81]

A. 200 yards is 600 feet.

Q. Yes, that's right. Did you fix that by any objects? A. No, I didn't.

Q. Then how did you fix that distance?

A. I just guessed it. That is just an estimation.

Q. That is an estimation. Did you estimate it by objects that you could see?

A. No, I did not.

Q. When you were there, stopped, and looking down the railroad track to your right, tell us what you saw.

A. I didn't see anything; I just seen the rails.

Q. Is that all? A. That is all.

Q. See any poles?

A. I didn't look for any poles.



(Testimony of John Martin Souza.)

Q. See any trees?

A. Naturally, there are trees in.

Q. You say—the reporter didn't get the entire answer.

A. If there was trees probably in my vision somewhere, but they just didn't focus.

Q. Was there anything else tha focused when you looked to the right?      A. No.

Q. Did you notice the Valley Brew sign?

A. No, I did not. [82]

Q. Did you notice the fences?

A. I didn't notice them.

Q. Did you notice anything at all of any kind or character other than the rails of the track?

A. No, I don't remember noticing anything.

Q. At that time you looked to the right, and then you swung your vision around and looked to the left?

A. That's right, when I was stopped.

Q. When you were stopped, that is what I am talking about. Do you recall anything that you saw at that time when you looked to your left?

A. Just the rails, and there is an orchard on the right that I could see.

Q. Well, you are mistaken by saying an orchard on the right. You mean the left, don't you?

A. Yes.

Q. There is a walnut orchard to the left?

A. Yes.

Q. When you looked ahead, do you remember anything that you saw at that time?

A. There was a gas station across the road.

(Testimony of John Martin Souza.)

Q. What did you see at that gas station?

A. Nothing in particular, I just—I didn't exactly look at the station. It was just in my line of vision.

Q. Did you see any automobiles moving? [83]

A. No, I didn't.

Q. At the time you left home, and at the ranch was there any haze there?

A. Yes, there is haze all through that country.

Q. Haze all through it. Will you please describe that haze that you have referred to for us?

A. Well, it is sort of a low-hanging mist. It wasn't high.

Q. How high?           A. How high?

Q. Yes.

A. I would say not very high from the ground, maybe five feet from the ground.

Q. Five feet from the ground?           A. Yes.

Q. You didn't have your windshield wiper going, did you?           A. No.

Q. With that mist at 5 feet from the ground, how far ahead into the mist could you see?

A. About 600 feet.

Q. About 600 feet. How far could you see up over that mist, over that 5 feet, where there was no mist?

A. I say the mist started at 5 feet from the ground.

Q. It was a low-hanging mist?           A. Yes.

Q. I want to know about the mist. Was it down on the ground? [84]

A. No, it was not down on the ground.

(Testimony of John Martin Souza.)

Q. It was 5 feet above the ground?

A. Approximately.

Q. Then underneath it, how far could you see?

A. It depends on how close to the ground.

Q. This is 5 feet from the ground. How high were your eyes when you were sitting in the automobile, from the ground?

A. About 5 feet.

Q. When you looked ahead under it how far could you see?

A. For about 600 feet.

Q. When you looked through it how far could you see?

A. About the same.

Q. About the same. So the mist didn't make any difference then, did it?

A. Yes, it did.

Q. What was the difference that the mist made?

A. Well, it entered into it, anyway.

Q. What?

A. It entered into it.

Q. I will ask you this: How far could you see where there was no mist, and how far could you see where there was mist?

A. I would say the mist was hanging through there. It didn't exactly cut off sharply at five feet.

Q. How high up did that mist go?

A. I don't know. [85]

Q. Could you see the sun?

A. Yes, I could.

Q. So it was clear, you could see through the mist, you saw the sun, itself?

A. Certainly.

Q. What is your estimate of how high above the ground the top of that mist was?

A. I couldn't say.

Q. You saw the top of trees?

A. I could see the trees if they were close to me.

(Testimony of John Martin Souza.)

Q. Was the mist as high as the top of the trees.

A. I don't know.

Q. If I understand you, this mist was lying right over this country side in a band that started approximately five feet above the ground, it didn't come down to the ground, and then was up for a distance that you could not estimate, and then above that it was clear.

A. I believe that's right.

Q. No clouds in the sky?

A. I don't know.

Q. Any wind blowing?

A. I don't remember if there was, or not.

Q. This mist, what was its character, was it damp?

A. Well, it was a cool morning. I guess you would say it was sort of damp. [86]

Q. Not damp enough, however, to get on your windshield to fog it so you had to use your windshield wiper?

A. No.

Q. Was it a mist, or was it a haze?

A. Well, it was sort of a mist, I would say.

The Court: What time of year was this?

Mr. Dunne: October 11, 1945, your Honor.

The Court: All right.

Q. (By Mr. Dunne): Did you ever have a conversation with a Mr. Aguer?

A. No; I never heard of him.

Q. Did you ever have a conversation, I think at your father's home, with a Mr. Bernard G. Aguer, an investigator, a claims agent of the Southern Pacific Company, who came there and had a

(Testimony of John Martin Souza.)

conversation with you, and I think your mother was present; do you recall that?

A. I recall some Southern Pacific Agent coming there, yes.

Q. That was on the 21st day of October, 1945, ten days after this accident?

A. I don't think it was ten days. I think it was less.

Q. You think it was less. So you were at home after the accident? A. Yes.

Q. At the time he called your mother was there?

A. Yes, she was. [87]

A. Yes, there was a conversation.

Q. He asked you some questions about this accident and you gave him some answers; isn't that true?

A. He asked me a few questions, yes.

Q. Then as he was talking and you were talking, he wrote some things down?

A. I don't remember him writing anything, no.

Q. Isn't it a fact that he wrote some things down and you then read over what he had written down? A. No, that is not true.

Q. Did he show you this statement and ask you to sign it, and you refused to sign it?

A. He didn't take any statement.

Q. Let me show it to you. I will show it to counsel first (handing document to counsel). There are six sheets of paper there. Have you ever seen any of those before? [88]

A. This was not written in my presence.

Q. Have you ever seen it before?

A. I have not.

(Testimony of John Martin Souza.)

Mr. Dunne: I will ask that this be marked for identification.

(The statement referred to was thereupon marked Defendant's Exhibit K for identification.)

Q. (By Mr. Dunne): Mr. Souza, I will ask you whether or not it is not a fact that on the occasion of this conversation with Mr. Aguer, the Southern Pacific claims agent or investigator, called upon you and had a conversation with you, you told him in substance or effect that on the morning and at the time of the accident it was a nice, clear, dry morning?

A. No, I didn't tell him that.

Q. Did you tell him any part of that?

A. No, I didn't tell him that.

Q. Did you tell him it was a nice morning?

A. I don't recall if I said that. When he came back I told him I didn't care to discuss the accident.

Q. Did you discuss it at all with him?

A. Well, we discussed maybe a little.

Q. Did you tell him it was a clear morning?

A. I don't recall if I did or not.

Q. Did you tell him it was a dry morning?

A. I remember I told him that I didn't care to discuss it and [89] then he left.

Q. By the way, what was the condition of the weather when you got up around 5:00, between 5:00 and 6:00? A. Well, it was cool.

Q. What else about the weather at that time?



(Testimony of John Martin Souza.)

A. Well, I don't remember if it was dark or light.

Q. Do you remember anything else about the weather at that time?      A. It was cool.

Q. When you quit milking the cows, did you then have breakfast?      A. Yes, I did.

Q. What was the condition of the weather at that time?      A. It was misty.

Q. A mist came up after you first started in, after you first got up?

A. I don't remember if it did or not.

Q. Do you remember when the mist came up?

A. No, I don't remember exactly when it came up.

Q. It came up, however, some time after you got up?

A. I don't remember if it was there before I got up or after.

Q. Did it change in character at any time from the time you got up until the time of the accident?

A. I don't remember if it did or not.

Q. Did you in the course of that conversation with Mr. Aguer [90] say to him in substance and effect, and I ask you if it is not a fact that you did say this to him, that when you were about 100 to 150 yards away from the crossing you looked for a train? Did you say that to him?

A. No, we did not discuss that fact at all.

Q. Did you at that time say to him, "I was slowing up and driving about 30 miles an hour at that time"?

A. We didn't discuss it that far at all.

(Testimony of John Martin Souza.)

Q. Is it a fact that you then said to him, "When I looked for a train I looked through the windshield"?

A. No, I didn't say anything about that much of the accident.

Q. Did you then say, "I never seen any train"?

A. I said that I didn't see a train. Yes, I said that.

Q. You said that much? A. Yes.

Q. Is it a fact that you said to him at that time, "I could see over this grapevine-covered fence"?

A. No, I didn't say that.

Q. Did you say anything about the grapevine fence?

A. Yes, I said there was a grapevine fence there.

Q. Isn't it a fact that you said you could see over it?

A. No, I didn't say anything about seeing around it or over it.

Q. Didn't you tell him at that time, "And when I got about 40 yards from the crossing I looked again through the windshield [91] to my right and to my left"? Did you say that to him?

A. No, we didn't discuss that much of it.

Q. Didn't you say that when you were still closer to the track, "I still had the fence on my right but could see over the fence O. K."?

A. I didn't discuss it that far.

Q. Did you say to him, "When I got about 10 feet from the crossing I was slowed up to about 8 miles an hour"? Did you say that to him?

A. We didn't discuss any measurements or speeds at all.

(Testimony of John Martin Souza.)

Q. Did you tell him, "About this time I was going into the track and was going about 5 miles an hour. I was shifting from high to second gear and looking straight ahead"?

A. No, I didn't say that.

Q. Did you say any part of that to him?

A. No, I did not.

Q. Did you say anything to him about shifting gears?

A. No, I did not.

A. How long was he there?

A. I don't remember. Just maybe five or ten minutes.

Q. Aside from saying that you didn't hear anything, did you at that time say anything else about how the accident happened?

A. I don't remember if I did.

Q. Do you remember anything about it at all?

A. About what?

Q. About that conversation.

A. I know he asked the names of all the family.

Q. Did you tell him at that time that probably the reason you did not see the engine was because of the blind spot where the door hinges to the windshield?

A. No, I didn't say anything about that.

Q. Did you say anything about the blind spot at all?

A. No, I did not.

Q. Did you tell him at that time whether or not you had a driver's license?

A. I didn't say anything about an operator's license at all.

(Testimony of John Martin Souza.)

Q. Did you have any discussion with him as to where or when you had obtained the automobile?

A. I don't remember if I did or not.

Q. Do you remember anything about the conversation at all?      A. Yes.

Q. What do you remember about the conversation.

A. Well, he asked the names of all the rest of my family.

Q. Is that all?

A. Well, he asked me how the accident happened and I told him I didn't see the train.

Q. Anything else?

A. Then I told him I didn't care to discuss the accident any further. [93]

Q. From the time you came down Beckwith Road and got to the point where the grapevine fence was to your right, from that time can you now recall anything that you recall seeing at that time except the front end of the locomotive when it was about 75 feet away from you, 50 to 75 feet, I think you said?

A. When I was on the tracks.

Q. Yes. Can you recall any other single thing distinctly now that you remember seeing at that time?      A. No.

Q. Can you remember now anything that you heard at any time from this time 600 feet away and you came along by that grapevine fence and went up to the track?

A. I don't remember hearing anything.

Q. So of the things that you can now remember

(Testimony of John Martin Souza.)

in the course of driving up to the track and getting onto the track, of the things that you saw and that fixed themselves in your memory, that you noticed and charged your memory with, the only thing is the front end of the locomotive 50 to 75 feet away?

A. I remember when I started up, I looked up and the gas station was there.

Q. But you do not recall what you saw there?

A. No.

Q. You do not recall what trees you saw?

A. Well, the trees would be in my vision.

Q. But you do not recall what poles you saw?

A. Well, it is the same poles. I know that place pretty well.

Q. Just at that corner was there a house to the right? A. Not right on the corner, no.

Q. Somewhat back from the intersection?

A. That is right.

Q. Did you see anybody there?

A. No, I did not.

Q. Did you see anybody to your left in the walnut grove? A. No, I did not.

Q. Did you see anybody ahead of you?

A. No, I did not.

Mr. Dunne: No further questions.

The Court: Any redirect?

#### Redirect Examination

Q. (By Mr. Myers): So that there will be no question about it, Mr. Souza, after you brought your car to a stop approximately 20 feet from the



(Testimony of John Martin Souza.)

railroad tracks, I believe you said you looked to the right, is that right?

Mr. Dunne: That is objected to as leading.

The Court: The objection is sustained. He has already given a full description. It is not necessary to repeat it. The only object of redirect examination is merely to explain anything that he said on cross, and not to have the last word of the witness. [95]

Q. (By Mr. Myers): Mr. Souza, when you were at a stop did you look one way or the other?

A. Yes, I did when I was stopped.

Q. What way did you look first?

A. I looked to my right first.

Q. How long did you look to your right?

A. Two or three seconds.

Q. Did you look in any other direction?

A. Then I looked to my left.

Q. How long did you look in that direction?

A. Another two or three seconds.

Q. When you moved from a stop over to the point where your automobile was struck, what was your maximum speed at any time, that is, the highest speed that you went now when you moved up from the stop?

A. I would say three or four miles an hour.

Q. Three to four miles an hour, so that it went from a stop up to three or four miles an hour and then the accident happened, is that right?

A. That is right.

Q. When you looked to your right and you looked to the left, what if anything did you ob-



(Testimony of John Martin Souza.)

serve with reference to this mist or haze that you have described? In other words, I want to know how far down those tracks you had an unimpaired vision.

A. I would say I could see about 600 feet. [96]

Q. And that would be in what direction? Just one direction or both directions?

A. Well, I could probably see a little more to my left as the sun would be in my eyes.

Mr. Myers: I think that is all.

Mr. Dunne: No more questions.

The Court: Step down. Call your next witness.

Mr. Myers: Call Mr. Oran Davis. Pardon me, your Honor. I called this one witness. He is going to be a long witness. There is a member of the Highway Patrol who is out there in the witness room and who will probably not take more than a few minutes to examine. May I call him instead of Mr. Davis?

The Court: Very well.

Mr. Myers: Please send in Mr. Hansen, the Highway Patrolman, first, Mr. Davis. I do not want to keep the police officer waiting, your Honor.

The Court: All right.

#### ANTHONY A. HANSEN

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the jury?      A. Anthony A. Hansen.

(Testimony of Anthony A. Hansen.)

Direct Examination

Q. (By Mr. Myers): Where do you live, Mr. Hansen? [97]

A. At Modesto.

Q. What is your occupation?

A. I am a state traffic officer of the California Highway Patrol.

Q. How long have you been such?

A. Approximately seven years.

Q. That was your employment on the 11th day of October 1945? A. Yes.

Q. On that day do you recall what hours you were on duty? A. Yes.

Q. What were they.

A. Nine in the morning until six in the evening.

Q. On that day or on that morning, Mr. Hansen, did you receive any call to go to the scene of an accident? A. Yes.

Q. What time did you receive that call, do you remember?

A. As near as I can remember, shortly after 9:00 o'clock.

Q. Then did you proceed to the scene of this accident? A. Yes.

Q. Where was that?

A. At the intersection of Beckwith Road and 99 Highway, at the railroad crossing, the Southern Pacific Crossing.

Q. Just tell us when you got there what, if anything, you observed?

(Testimony of Anthony A. Hansen.)

A. I observed a car, the wrecked car had apparently been thrown [98] off the track by the impact of an accident, and had broken off a wooden crossing sign and three people lying injured on the ground.

Q. What were their conditions?

A. Apparently they were very severely injured. I ascertained that one had been apparently killed outright at the time of the accident.

Q. Did you see the driver of the automobile, this young man here, Mr. John Martin Souza?

A. Yes.

Q. What was his condition?

A. He was apparently in very great shock and possibly other injuries that I could not determine at the time of the accident.

Q. What was the condition of the third occupant of that automobile? Was he conscious, unconscious or what?

A. He was more or less unconscious. He was not intelligible in his speech or anything. You might say he was unconscious for the purpose of——

Q. When you arrived there at the scene of the accident and saw these injured parties, did you interview them or anything with reference to the accident?

A. That was impossible due to their condition.

Q. What, if anything, did you do with reference to calling an ambulance? [99]

A. I ascertained that an ambulance had already been called and beset myself with assisting the in-

(Testimony of Anthony A. Hansen.)

jured people at the scene until the ambulance arrived.

Q. Besides the occupants of the automobile, did you see any members of the engine or train crew?

A. Yes.

Q. How many were there?

A. Two that I could remember.

Q. And you interviewed those, or did you?

A. I talked with them and got the pertinent information for the accident report.

Q. How long had you been there when the ambulance arrived?

A. Oh, probably seven or eight minutes.

Q. Just tell us what you did with reference to making an investigation of this accident. Did you find out whether or not there were any witnesses present?

A. Well, I——

Mr. Dunne: That is objected to as calling for hearsay. Obviously you could find that out only by asking——

The Court: I beg your pardon?

Mr. Dunne: It is objected to as calling for hearsay.

The Court: I do not know. He is not going to testify as to what he found out. He is not going to testify to hearsay. He is merely testifying to the inquiry he made. Go ahead. It may be stated whether a man asked who other than the persons [100] riding in the car may have seen the accident. Overruled.

The Witness: I was busy with the injured until after the ambulance left. I had no time to

(Testimony of Anthony A. Hansen.)

do anything other than look out for the injured people, and then I immediately, after the ambulance left, asked if there were any witnesses at the scene of the accident who had seen the accident.

Q. (By Mr. Myers): At that time did you obtain any?      A. I did not.

Q. Officer Hansen, are you familiar with that particular district between North Avenue and Beckwith Road?      A. Yes.

Q. The intersection of those roads with Highway 99?      A. Yes.

Q. Do you know approximately how far those roads are apart?      A. Approximately, yes.

Q. What is your best estimate?

A. I would say right in the vicinity of three quarters of a mile.

Q. When you came to the scene of the accident, from what direction did you come?

A. I came from Modesto. That would be traveling in a northerly direction.

Q. Do you recall what kind of a morning this was, that is, whether it was a clear morning or just what the weather conditions were?

A. Yes, it was a characteristic morning for that time of the [101] year. It was what would ordinarily be considered clear. There was a light haze hanging in the atmosphere, but nothing that would be considered out of the ordinary.

Q. How far would you say your visibility would extend, having in mind the condition of this light haze that you say was hanging in the atmosphere?

A. It would depend upon what you were look-



(Testimony of Anthony A. Hansen.)

ing at. It might extend 200 feet for one object and a thousand feet for another.

Q. That would depend upon the condition of the haze at that particular point, is that right?

A. It would depend also upon the object that you were looking at, color, shape, size, and so forth.

Mr. Myers: You may cross examine.

#### Cross Examination

Q. (By Mr. Dunne): Officer, do you have your report here?      A. I do not.

Mr. Dunne: No further questions.

The Court: Step down. Call your next witness.

Mr. Myers: Thank you, Officer. Your Honor, may this witness be excused?

The Court: Yes, he may be excused.

#### ORAN DAVIS

was called as a witness on behalf of the plaintiffs and being [102] first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the jury?      A. Oran Davis.

#### Direct Examination

Q. (By Mr. Myers): Mr. Davis, will you speak up please, in answer to the questions so some of us who are a little deaf can hear you?

A. Yes, sir.

Q. Where do you live now, Mr. Davis?

A. Los Angeles, Bellflower.

Q. Where did you live on the 11th day of October 1945?



(Testimony of Oran Davis.)

A. Modesto, out on Schumate Avenue, on the E. Freeman Ranch.

Q. This E. Freeman ranch was a dairy?

A. Yes, sir.

Q. And you were employed there?

A. Yes, sir.

Q. How long had you been employed there?

A. About a little over a year, about a year, something like that.

Q. How long did you live in the vicinity of Modesto up until the 11th day of October 1945?

A. About 10 years.

Q. Before that time, in other words, prior to this 10 years that you had lived there, where did you live?

A. Other than Freeman's—oh, prior to that? In Texas. [103]

Q. Prior to the 10 years you lived in Modesto?

A. In Texas.

Q. Born and raised in Texas?

A. Yes, sir.

Q. Mr. Davis, on the day that this accident happened you were working where?

A. E. Freeman's.

Q. Do you recall an accident that happened at the intersections of Beckwith Road and the railroad crossing?      A. Yes, I do.

Q. Prior to the time that this accident happened, what were you doing?

A. Prior to this time?

Q. Yes.

A. Well, I was—what was I doing that morning?

(Testimony of Oran Davis.)

Q. That is right.

A. Well, I was driving down North Road.

Q. Where is North Road with reference to Beckwith Road?

A. It is south of Beckwith Road.

Q. I have just a rough diagram here, Mr. Davis, and I have indicated Beckwith Road here as coming into the crossing and Highway 99. Would North Avenue or North Road be somewhere to the south?      A. It would.

Q. In the direction I am indicating here to the right of the [104] diagram, is that right?

A. It would be the south of it. It would be the right of it.

Q. That is right, to the south of Beckwith Road or to the right of the diagram.

A. To the right of the diagram.

Q. Where had you come from?

A. Where had I come from that morning?

Q. That is right.

A. I had come from Freeman's.

Q. Where were you going?

A. I was going over to a fellow by the name of Evans across 99, over on Dale Road.

Q. Were you alone or did you have someone with you?      A. I had a fellow with me.

Q. What was his name?      A. Lucas.

Q. Do you remember his first name?

A. Louis Lucas, I believe.

Q. Where did he live or work then?

A. He lived about a quarter of a mile to the west of me, working for a fellow by the name of Corsan.

(Testimony of Oran Davis.)

Q. What was his occupation?

A. Dairy milker.

Q. Do you know where he lives now?

A. No, I do not. [105]

Q. What was the last time you saw Mr. Lucas?

A. The last time I saw Mr. Lucas was about—well, it was about in the middle of the year, in July, I believe, of 1945, something like that. I don't recall the exact date.

Q. 1945 or 1946?

A. 1945. I don't know just exactly—oh, '45—no, I have seen him about a month after that or something like that. I don't know just when. I know I had taken him there. I didn't know the fellow so well. I had taken him over to this place on the morning of the accident. He hired me to take him over there to this Mr. Evans' ranch and after that he moved away, and I met him at one time after that. I don't know just exactly how long it was, maybe a month or two after that, something like that.

Q. In any event, Mr. Davis, did you see an accident between a locomotive and an automobile at the intersection of Beckwith Road and the Southern Pacific railroad tracks there?

A. I did, yes, sir.

Q. Had you seen that particular locomotive before this accident happened?

A. Before? Yes, sir.

Q. Where was that locomotive when you first saw it?

A. Just behind me, after I crossed North Road,

(Testimony of Oran Davis.)

across the crossing, the railroad crossing on North Road—just not exactly behind me, behind and to the left of me. [106]

Q. Here is a diagram that Mr. Dunne has put on the board, and according to that diagram North Road comes into the right of the map here across the railroad tracks. This is Highway 101 running through here. Here is Beckwith Road over to the left. In other words, Beckwith Road would be approximately north or northwest of North Avenue.

A. It is 99 instead of 101.

Q. Did I saw 101? I am sorry. Highway 99. And you say the locomotive was behind you when you first saw it? A. Yes, sir.

Q. Whereabouts was it behind you? Just indicate here, if you will.

A. Just as I went across the road, across here, I stopped at the railroad crossing and looked down the track, and I rolled across, and it whizzed behind me about 10 feet after I crossed; I looked around to my left and to the side of me and there it was.

Q. When you say it whizzed behind you, whereabouts was your automobile?

A. It was about 10 foot across the track to the east.

Q. To the east of the track, is that right?

A. Yes.

Q. What, if anything, that caused your attention to the locomotive as you went across the track?

Mr. Dunne: That is objected to as immaterial.

The Court: Overruled.

(Testimony of Oran Davis.)

The Witness: Go ahead and answer?

The Court: Go ahead.

The Witness: I didn't see the train. I stopped at the track. I didn't see the train, and when it whizzed behind me it excited me and so I thought, "Well,—"

Mr. Dunne: Just a moment.

Mr. Myers: Leave out what you thought, Mr. Davis.

The Witness: The train looked dangerous to me, see?

Mr. Dunne: I move to strike that out.

The Court: That may be stricken out.

The Witness: It caused me—I whizzed onto 99 and I went right on up the road, increased my speed up rapidly to try to clock the train, to see how fast it was going, and I made a remark——

Q. (By Mr. Myers): Wait a minute. Now, why did you do that?

A. Well, I knew it was dangerous, you see, the way it was going.

Mr. Dunne: I move to strike that out.

The Court: That my stricken. He can describe his act. It is not a question requiring the intent of a person. We are dealing with what he did and what he saw. The jury are to disregard any answer which I have stricken.

Q. (By Mr. Myers): You took out after it, is that right? A. I did. [108]

Q. Did you have your eye on that locomotive then continuously up to the time that this other accident happened? A. Yes, sir.



(Testimony of Oran Davis.)

Q. Will you tell us whether or not during that whole distance that the locomotive traveled while you were watching it there was any bell ringing on that locomotive or any whistle sounding?

A. No, sir.

Q. Did any whistle sound at all when you crossed the track at North Avenue?

Mr. Dunne: That is objected to as immaterial and calling for a conclusion.

The Court: I think I will object to that. He said he did not see the train, and therefore the same ruling applies to him as I made in the case of the other witness. He can only testify as to whether he heard a whistle.

Mr. Myers: Yes, your Honor.

Q. Did you hear any bell or any whistle?

A. I heard a whistle just after he crossed North Road.

Q. After you crossed? A. After I crossed.

Q. After you crossed the railroad track——

A. Yes, sir.

Q. —you say you then heard a whistle?

A. After I crossed, the train was just across North Road, it [110] whistled.

Q. How did it whistle?

A. Just one blast.

Q. You took out after this engine, Mr. Davis, and tell us what, if anything, you saw at Beckwith Road.

A. I had taken out after the engine. I wanted to know how fast it was going because it almost got me.



(Testimony of Oran Davis.)

Mr. Dunne: I move to strike that out as a conclusion. This man can state what he did, what he saw and what he heard.

The Court: That may be stricken. Strike that out.

The Witness: I seen a car coming up on Beck-with Road, just up the crossing there, and then "bang" it hit it, and debris blew all over. And so I turned right around, just in the intersection of Dale Road, and I pulled out and went back over to the accident.

Q. (By Mr. Myers): Now, you say you turned right around at the intersection of Dale Road and Highway 99. Will you look on this map and see if you see the intersection of Dale Road and Highway 99?

A. Yes, sir, right here (indicating).

Q. At this point you say you turned around and you did what?

A. Turned around and went back over to the scene of the accident.

Q. When you got over to the scene of the accident what, if anything, did you see? [110]

A. When I got over there I seen an elderly man who was laying out—one of the elder of the three—laying out, apparently dead, and one of the boys was laying out prone there, seemed to be unconscious, and another one of the fellows was in the car, so I got in there and helped to take him out.

Q. Did you see this young man here, John Martin Souza?

A. Yes, sir.

(Testimony of Oran Davis.)

Q. Where was he?

A. He was laying prone out at the front of the accident like facing east.

Q. Was he conscious or unconscious?

A. He was unconscious.

Q. What else did you do then?

A. Well, I stayed there and helped around there until the ambulance came up, and then I went on my way.

Q. While you were there did you observe what, if anything, happened to the engine, the locomotive?

A. In the accident, you mean?

Q. No, after the accident.

A. Well, they backed down the track—they went on up the road quite a ways, a thousand foot or better, and then they backed down and the engine crew got out, three or four fellows.

Q. You say they went on down the highway a thousand feet or better?

A. Anyway a thousand feet or better. [111]

Q. When they backed down or backed to the scene of this accident, did you observe how many people got out of the cab of that locomotive?

A. I know it was three.

Q. You know that there were at least three?

A. I know that there was at least three.

Q. Did you observe anything about that locomotive with reference to its color or anything?

A. I know it had a silver front. I know that.

Q. On this particular morning, as you drove down North Avenue and you made your stop there

(Testimony of Oran Davis.)

at the intersection of North Avenue and the railroad tracks, what, if anything, did you observe with reference to climatic conditions?

A. Well, the sun was shining in my face, there was a kind of a hazy morning, and I suppose that obstructed my view of the train.

Q. How far down the railroad tracks to your right and to your left could you see?

A. Oh, about 250, 300 feet.

Q. 250 or 300 feet, is that right, sir? How would you describe that haze? Was it a fog or just what was it?

A. It was a low-hanging haze, a fall morning. I don't know. It was just about right in my eyes where I couldn't see very far. It wasn't a cloudy morning. It was kind of a haze, kind of a damp fog. [112]

Q. This was a fall morning and was it cold that morning?

A. Well, it wasn't so cold. It was kind of a cold morning.

Q. The sun was shining brightly, was it?

A. Yes, sir.

Q. Any estimate as to the speed of the locomotive as it traveled from the point you first saw it at North Avenue up to the scene of the accident at Beckwith Road?

A. You want to know how fast we figured it was going?

Q. What is that?

A. You want to know how fast we thought it was going?

(Testimony of Oran Davis.)

The Court: That is right, not in terms of fast or slow, but in miles per hour.

The Witness: 60 miles an hour.

Mr. Myers: You may cross examine.

The Court: I think so as not to break the continuity of the cross examination we will take a short recess at this time. It is stipulated the usual admonition has been given. Ten minutes.

(Recess.) [113]

The Court: Proceed.

### Cross-Examination

Q. (By Mr. Dunne): Mr. Davis, you were driving east on North Road approaching the railroad track and Highway 99, were you?

A. Correct.

Q. Before crossing a railroad track you stop; is that right? A. Yes.

Q. You were stopped. When you stopped how far could you see to your right?

A. About 250 or 300 feet.

Q. How far could you see to your left?

A. Oh, a little further than that.

Q. How much further?

A. Maybe a hundred, two hundred feet further.

Q. Then to your left you could see only 350 to 400 feet; or so, is that correct?

A. To my left, or right? I could see 250 or 300—the sun was shining in my face.

Q. To your left.

A. I could see further.

(Testimony of Oran Davis.)

Q. I want to know how far.

A. Three or four hundred feet.

Q. Why couldn't you see any further?

A. Why couldn't I?

Q. Yes. [114]

A. On account of a haze.

Q. Will you please describe that haze for us?

A. Well, it was a little mist or a haze hanging above the ground four or five feet.

Q. Was it down to the ground?

A. No, it wasn't exactly right on the ground.

Q. How high above the ground did it extend?

A. Something like ten or twelve feet.

Q. Above that the sun was shining?

A. Yes.

Q. So there was no haze to interfere with an object that was 15 feet high?

A. Well, there must have been; I didn't see the trees.

Q. Never mind about not seeing the trees. I want to know about the haze. Was there anything in the haze to interfere with an object that was 15 feet above the ground? A. Yes.

Q. What? A. The haze.

Q. How high was that haze?

A. Well, I don't know just how high it was.

Q. Give us your best recollection.

A. 12 to 15 feet.

Q. 15 feet, now. Was it higher than 15 feet?

A. I don't know. [115]

Q. You did say that you crossed the railroad track and the locomotive passed behind you, did it not? A. Yes.

(Testimony of Oran Davis.)

Q. Was that locomotive continuously and continually in your vision from that time until the time of the accident?

A. Did he continue on in my vision? I whizzed right around the turn to my left on Highway 99 and went right on up the road 45 to 50 miles an hour.

Q. Were you looking at the locomotive?

A. Yes.

Q. Was it within your vision all this time?

A. It was.

Q. Anything to interfere with that vision?

A. No.

Q. Did it ever pass out of your vision?

A. No.

Q. Highway 99 is a divided highway and was at that time?      A. Yes.

Q. There were trees in the middle of that island dividing the two sets of lanes, weren't there?

A. Well, the way I remember, I don't know; I don't think so.

Q. Were there any trees or shrubs along the side of the railroad track between you and the locomotive?

A. Not between me and the locomotive, no.

Q. Take a look at this picture. You will see on the far [116] side of the railroad track there a row of trees. Were they there at the time of the accident?

A. On the far side of the railroad track?

Q. Yes.

A. They were there.



(Testimony of Oran Davis.)

Q. They were between you and the locomotive, were they not?     A. No, sir.

Q. Were they there?

A. They were there, but they wasn't—those trees are—not between me and the locomotive.

Q. Those trees are between the railroad track and Highway 99, aren't they?     A. No.

Q. That is Defendant's F. Will you look at Defendant's Exhibit H and tell me whether the row of trees that appears there is between the railroad track and Highway 99?

A. That row of trees comes out in opposite direction on 99; that is not between the railroad track—99 and the railroad track.

Q. You recognize that picture?

A. That looks like—that is Beckwith Road with the little road turning out, that is about right there.

Q. Can you in that picture distinguish Highway 99?     A. Yes. Oh, no, I can't.

Q. Look at Defendant's Exhibit I. Do you see Highway 99, or [117] any part of it, in that picture?

A. I don't see it there. I don't know much about photographs.

Q. What is this right along here, a paved strip I am putting my finger to the left of that picture, beyond this railroad track?     A. What is that?

Q. Yes.

A. That is a paved strip, that is a road.

Q. What road?

A. I don't know what road; I can't tell.

Q. Is it any part of Highway 99?

(Testimony of Oran Davis.)

A. It looks more like 99 over here, but it is not, I know. That is Beckwith Road. I know it by this.

Q. You can't see Highway 99 in that picture, at all?

A. No. If that is it over there, that is it.

Q. On that picture as you look at it, were those trees between the railroad track and the road?

A. Well, that don't look like Highway 99 to me.

Q. I show you Plaintiff's Exhibit No. 2. Can you recognize that photograph? A. Yes.

Q. What is that?

A. That is a railroad crossing.

Q. Where?

A. I can't tell. That is just a cross-arm on a railroad. It [118] doesn't show exactly where, plainly.

Q. Do you see beyond the railroad track in that photograph a row of trees? A. I can.

Q. Do you see any highway between the trees and the railroad track?

A. I can see a print of a road there; I can't swear it is 99 in that picture, from that photograph.

Q. It is your testimony now, however, that as you came northward on Highway 99, and as the locomotive was traveling from North Road toward Beckwith Road, that you were looking at the locomotive all that time? A. Yes, I did.

Q. And it was always within your vision?

A. Yes.

Q. There was nothing to interfere with your vision whatsoever? A. No.

(Testimony of Oran Davis.)

Q. I show you a photograph and ask you if you can recognize that.

A. I do. That is 99.

Q. Highway 99. Where?

A. Well, I don't know where. I know it looks like 99.

Q. Will you notice in that photograph there are two lanes of highway? A. Yes.

Q. How many lanes of highway were there on 99? [119] A. Two lanes.

Q. Just two?

A. Just two. Well, it is a double highway, four lanes.

Q. Four lanes. There were two lanes for northward traffic from Modesto up toward Manteca?

A. Yes.

Q. And there were two lanes for southward traffic from Manteca toward Modesto?

A. Yes.

Q. They were divided by a strip in between, were they not? A. Yes.

Q. There were trees and shrubbery growing in that strip?

A. Well, some places along this road, yes; other places it was not.

Q. Between North Avenue and Beckwith Road, in that strip between the two pairs of lanes, were there any trees or shrubbery?

A. No, I don't think there was. I could keep my eye right on the train all the way up.

Mr. Dunne: I ask this be introduced for identification.

(Testimony of Oran Davis.)

(The photograph was marked Defendant's Exhibit L For Identification.)

Q. (By Mr. Dunne): I will show you another picture and ask you if you recognize that photograph. A. That is Highway 99.

Q. Where, do you know? [120]

A. I don't know just where, but I recognize the line here, looks like a chicken ranch there that I used to have.

Q. That is between North Road and Beckwith Road, isn't it? A. No, it is not.

Q. It is between the intersection of North Road and Dale, isn't it?

A. No. I am pretty sure it is not.

Mr. Dunne: I ask this be marked for identification.

(The photograph was marked Defendant's Exhibit M for Identification.)

Q. (By Mr. Dunne): I show you another picture. Do you recognize this?

A. Yes, sir. Looks like Highway 99.

Q. Do you know where?

A. No, I don't know where.

Mr. Dunne: I ask that this picture be marked for identification.

(The photograph was marked for Defendant's Exhibit N for Identification.)

Q. (By Mr. Dunne): Here is another one. Do you recognize that?

(Testimony of Oran Davis.)

A. It looks like—all I say say, it looks like Highway 99.

Q. Do you know where? A. No.

Mr. Dunne: I ask that this be marked for identification.

(The photograph was marked Defendant's Exhibit O for [121] Identification.)

Q. (By Mr. Dunne): Do you recognize that photograph?

A. I don't know exactly.

Q. Don't you recognize that as the intersection of Highway 99 and Dale Road?

A. And Dale Road? That don't look like Dale. Dale Road turns off to the right of 99.

Q. Isn't that road intersecting there turning off to the right?

A. Well, this picture is going north, it is——

Q. Look at it again. Do you know Brownie's gas station? A. Brownie's?

Q. Yes.

A. Is that right next to Woodbridge Store? I know it.

Q. That's right.

A. I know it, then. I didn't know the name of it.

Q. Do you see it in that photograph?

A. I believe I recognize the station, there. I can't tell that it is.

Q. Is that the gas station on Highway 99 that is slightly north of where Dale Road turns off?

A. I am not positive. I believe that is it. If that is the gas station that is it.

(Testimony of Oran Davis.)

Q. Do you know where the power line is?

A. Yes. [122]

Q. Do you recognize the power line in that photograph, power towers?

A. That doesn't look quite like that. Dale Road doesn't turn off—don't look like it turns off at that short an angle. However, it could. I don't know much about photographs. I can't tell too much about them.

Mr. Dunne: I ask this be marked for identification.

(The photograph was marked Defendant's Exhibit P for Identification.)

Q. (By Mr. Dunne): Do you recognize that one? There is a sign there that may help you.

A. That is more plain. That is more like it.

Q. What is that? A. It is Dale Road.

Q. Just ahead do you see the gas station?

A. Yes.

Q. And the power line tower? A. Right.

Q. And Highway 99? A. I do.

Q. Do you recognize it? A. Yes.

Q. And beyond that a row of trees between those two lanes and the other two lanes; isn't that correct?

A. I see in this picture some low shrubs here, some trees [123] on up——

Q. Between where that picture was taken and the railroad tracks?

A. That is the way the picture shows here.



(Testimony of Oran Davis.)

Q. Is that a correct representation of the way it appears at that time in that point approximately south and east of the intersection of Dale Road and Highway 99, looking in a generally north-westerly direction?

A. Well, I can see—I don't know where, exactly—it don't look exactly right there. This, here, the row of trees begins past, on the other side, north of Beckwith Road, looks in the picture.

Q. What is this row of trees, right here, to the very left of the photograph? A. What is that?

Q. Yes.

A. The very left, it looks like a walnut orchard.

Mr. Dunne: We ask that this be marked for identification.

(The photograph was marked Defendant's Exhibit Q for Identification.)

Q. (By Mr. Dunne): After you crossed the railroad track you were going to turn left on Highway 99, were you not? A. Yes.

Q. Using the directions you have been using, you were going to cross over to the north lane?

A. Cross the north lane? [124]

Q. Across to the north lane, and you were going to turn left and go north on Highway 99?

A. Because there is a right-hand lane, naturally.

Q. In order to do that you had to cross two south lanes, southbound lanes, didn't you?

A. Cross two southbound lanes?

Q. Yes.

A. Yes. The one lane over there, had to cross the left lane going into the right lane.

(Testimony of Oran Davis.)

Q. Did you make a stop before you crossed those two southbound lanes?

A. I went up there and paused, and there was no traffic coming, so I whizzed right on around.

Q. Let's get this straight, then. You came down North Avenue, or North Road, toward the railroad track, and stopped?      A. Yes.

Q. I will put a cross there. I am drawing a line now following your course. Then you went across the railroad track and stopped again before crossing the southbound lane?

A. Naturally, just paused a minute, just a minute; there wasn't traffic that morning, it wasn't much at that time of the morning, so I just whizzed right on around.

Q. But you did make a pause there?

A. Just a pause.

Q. Just after you crossed over the railroad track about ten [125] feet that locomotive went by?

A. Yes.

Q. Then it passed you before you made the pause?      A. Yes, just before I made it.

Q. Then after you made the pause you crossed the southbound lane and got into the northbound lane; is that correct?

A. It is a wide crossing there.

Q. So you got into the north lane and you kept on up the north lane until you got to the crossing with Dale Road?      A. Yes.

Q. Now, then, as you were traveling, after you got in the north lane, you were traveling up to-

(Testimony of Oran Davis.)

ward Dale Road, you were going 45 miles an hour?

A. Well, 45 or over. I never looked at my speedometer.

Q. Do you remember when your deposition was taken in this case? A. Yes.

Q. Your deposition was taken in Mr. Myers' office in the Bank of America Building, in Oakland, on the 7th of November, 1946, was it not?

A. 7th of November?

Q. Yes.

A. I don't remember the exact date. I know I was up there, yes.

Q. It was taken about November, 1946?

A. Yes. [126]

Q. At that time you were under oath, were you not? A. Yes.

Q. And questions were put to you and you made various answers; is that correct? A. Yes.

Q. At that time were you endeavoring to testify truthfully? A. Never, did you say?

Q. Were you trying to testify truthfully.

A. Yes.

Q. I want you to look at page 20 of your deposition, at line 9. At that time I will ask you if this question was put at you and you did not give this answer:

"Q. How fast did you travel down the highway after you turned on to Highway 99 going north to turn down Dale Road?

"A. Oh, about 45."

Did you so testify?

(Testimony of Oran Davis.)

A. Well, between 45 and 50 or 60 miles an hour.

Q. Please, just a minute. Did you so testify when your deposition was taken?

The Court: I presume counsel will stipulate that——

Mr. Myers: Yes, I will stipulate.

The Court: It is continuing on his deposition he so testified.

Mr. Dunne: Line 19:

“Q. You drove from North Road and the intersection of [127] the railroad track, down Highway 99, and then down Dale Road to a point about opposite the scene of the accident?

A. Just about opposite, maybe not quite, I don't know.

Q. At 45 miles an hour, is that right?

A. That is right.”

A. Between 45 and 50.

Q. Just a minute. Did you so testify?

Mr. Myers: I will stipulate the witness did.

A. I did.

Q. (By Mr. Dunne): On your deposition you did not say between 45 and 50, did you?

A. I don't remember if I said it, or not.

Q. Is that correct, is that the way you testified on your deposition, what you have before you, there? A. That is the way I testified.

Q. All right. After you got to Dale Road you turned to the right on Dale Road, did you not?

A. Yes.

Q. You then went down Dale Road about a quarter of a mile? A. No.

(Testimony of Oran Davis.)

Q. Now, if you will turn to page 15 of your deposition, look at line 3:

“Q. About how far had you gone down Dale Road at the time of the accident?

A. Well, just about—oh, something like a quarter of [128] a mile.”

You so testified, did you not?

A. I went back over to——

Q. Just a minute. Answer my question, please.

A. I so testified.

Q. If you have an explanation you can give it.

A. I testified to that, yes.

Q. The next question and answer:

“Q. Were you about at a point where, if Beckwith Road ran right straight on through across to Dale Road, would that be about the point where you were? A. Approximately.”

Did you so testify? A. Yes.

Q. Then if you will look at this diagram, this is Beckwith Road if Beckwith Road were extended across the field, it would extend right across to about where Walnut Road is? A. Yes.

Q. That is about where you got, to the opposite of Beckwith Road?

A. No, I got down in here. I was over, right in about there.

Q. You got right in here. I will put on this exhibit, which is Court's Exhibit 1, a circle right around.

Let me ask you this question: On your deposition you testified: [129]



(Testimony of Oran Davis.)

“Q. Were you about at a point where, if Beckwith Road ran right straight on through across to Dale Road, would that be about the point where you were? A. Approximately.”

Did you so testify?

A. Yes, I testified.

Q. Was that testimony correct at the time you gave it?

A. Well, since then I have been up there. I would state I wasn't that far up the road.

Q. That was your best recollection in November, 1946, at the time your deposition was taken, wasn't it?

A. That was my best recollection, yes.

Q. Now, you have been up there since then; is that correct?

A. On the way up from Los Angeles the other day I drove up the road just to refresh my memory on it to see really where I was at.

Mr. Myers: Pardon me, your Honor: May I ask counsel what page he is referring to in the deposition?

Mr. Dunne: Page 15. I thought I told that to the witness.

Mr. Myers: Thank you.

Q. (By Mr. Dunne): Now, did you see the accident, itself? A. Yes.

Q. Will you please tell us exactly what you saw?

A. Just as I entered Dale Road I seen a car come up on the crossing of Beckwith Road, and



(Testimony of Oran Davis.)

just at the time of the accident [130] they just approximately, they was almost together, and then I seen debrie flying through the air, fenders, tires and things, and then I turned right around right then and went right back over there, over to the accident, the scene of the accident, to help take care of the injured.

Q. What color was the automobile?

A. Well, the automobile was, I don't know, I don't remember exactly, some kind of a light color, grayish, blue, tan color, or something.

Q. You had no trouble seeing that through the haze, did you?           A. No, I did not.

Q. Did you see the automobile knock down one of the crossing signs at the crossing?

A. I seen when the train hit it, it hit the sign and the sign went up in the air.

Q. The sign was painted white, wasn't it?

A. Yes.

Q. You had no trouble seeing that through the haze, did you?

A. Had no trouble looking to the left. I could see further to the left.

Q. How far, what is your estimate of the distance from the crossing—the distance from the intersection of Dale Road to the crossing?

A. I will say about five or six hundred feet, in my estimation.

Q. Were there any trees, or shrubs, or anything of that sort [131] within your line of vision?

A. There was nothing to obstruct my view.

Q. I want to call your attention to this dia-

(Testimony of Oran Davis.)

gram. The circle you put as being the place where you stopped and turned and the point of accident. Will you now say there were no shrubs or trees or anything that would affect your line of vision?

A. There wasn't nothing. I could see the locomotive and the car plain.

Q. About what time of the morning was it?

A. It was around nine o'clock.

Q. After the accident did the locomotive keep going? A. Yes.

Q. How far did it go?

A. Oh, about a thousand feet, something like that.

Q. Did you see it stop?

A. Yes, I seen it stop, after I was up there, got up there and they stopped and backed up.

Q. Had you seen it stop before you turned on Dale Road? A. No, I didn't.

Q. As you made the turn at Dale Road, did the locomotive pass out of your sight at any time?

A. No.

Q. You were looking at it all the time?

A. All the time.

Q. You made a right-hand turn into Dale Road without taking [132] your eyes off the locomotive, is that correct?

A. Dale Road isn't on exactly a right-hand turn, not a direct right-hand turn.

Q. You made some kind of a turn?

A. I did.

Q. Without taking your eyes off the locomotive?

(Testimony of Oran Davis.)

A. Well, might have been a glance off; anyway, just a turn, I was looking right at that.

Q. Coming up the highway you were watching the highway and the traffic?

A. On my side I didn't have to watch.

Q. As a matter of fact, you were watching the road where you were driving?

A. Naturally, you would watch the road.

Q. And you were looking for Dale Road?

A. I didn't have to look for it. I knew right where it was.

Q. You were watching for it, weren't you?

A. Certainly.

Q. When you turned you looked along Dale Road as you made the turn?

A. I had to look at it a little bit.

Q. Now, isn't it the truth that you drove up Dale Road to approximately where Walnut Avenue is?

A. No.

Mr. Dunne: I have no further questions. [133]

#### Redirect Examination

Q. (By Mr. Myers): At the time of the taking of your deposition, Mr. Davis, you were asked, I think it was on page 26, this question:

"So there will be no confusion in the record, as I understand your testimony, the accident happened at Beckwith Road, which is about 4/5 of a mile from the North Road crossing, is that correct?

A. That is right."

A. (The Witness): Yes.

Q. "Q. And at the time of the accident at Beck-

(Testimony of Oran Davis.)

with Road you were approximately a half a mile north of the North Road crossing?

A. That is right."

That was the testimony you gave at the time of the taking of your deposition; is that right?

A. Yes.

Mr. Myers: Your Honor, may I ask counsel if he is willing to stipulate that some photographs in the original deposition of this witness taken at my office—I would like to put them in evidence. I would like to offer these photographs in evidence as Plaintiffs' Exhibits next in order, so they may be in evidence. We can just detach them from the deposition, can we not, Counsel?

The Court: Well, I will take care of the technique. [134] We don't usually detach them from the deposition, but he can take them by reference.

Mr. Dunne: I think, as a matter of fact, it is in evidence. I think they are duplicates of the photographs that are already in.

Mr. Myers: I don't think one or two of them are in evidence. Rather than go into that, if your Honor will permit——

Mr. Dunne: Then I will prefer to have a foundation laid, either by reading the testimony in the deposition, or showing them to the witness.

Mr. Myers: Well, all right.

Q. I show you Plaintiffs' Exhibit No. 1 attached to your deposition and ask you if that is a fair representation of the railroad track running in an easterly and westerly direction in the vicinity of Beckwith Road.           A. Yes.

(Testimony of Oran Davis.)

Mr. Myers: I will offer that in evidence, your Honor, as plaintiffs' exhibit next in order.

(The photograph was marked Plaintiffs' Exhibit 6 in evidence.)

Q. (By Mr. Myers): I show you another photograph marked Exhibit 2 in the deposition, and ask you whether or not that is a fair representation of Beckwith Road and the grapevines on the south side of Beckwith Road at the intersection.

A. Yes. [135]

Mr. Myers: We offer that in evidence as Plaintiffs' Exhibit next in order, your Honor.

(The photograph was marked Plaintiffs' Exhibit 7 in evidence.)

Q. (By Mr. Myers): I will show you Exhibit No. 3 in your deposition, Mr. Davis, and ask you whether or not that is a fair representation looking east on Beckwith Road into the intersection of the railroad tracks with Beckwith Road.

A. Yes, it is.

Mr. Myers: We offer that in evidence as Plaintiffs' Exhibit next in order.

(The photograph was marked Plaintiffs' Exhibit 8 in evidence.) [136]

Mr. Myers: This one is marked Defendant's Exhibit No. 2, your Honor. This one is marked Defendant's Exhibit No. 1, your Honor. I may as well put it in.

The Court: All right.

(Testimony of Oran Davis.)

Q. (By Mr. Myers): Attached to the deposition is Defendant's Exhibit 1 which purports to show the end of Beckwith Road as it runs into the intersection with the Southern Pacific tracks, and I ask you whether or not that is a fair representation of that intersection.

A. That is a fair representation.

Mr. Myers: I offer that in evidence as plaintiff's exhibit next in order.

(The photograph in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

The Court: You can leave them there or detach them and use them by reference, whichever way you want. I think it is better to detach them, Mr. Clerk. Anything further?

Mr. Myers: Pardon me just a second, your Honor. I think that is all.

#### Recross-Examination

Q. (By Mr. Dunne): Mr. Davis, on that same deposition immediately after the part that counsel read to you—I will show you my copy while the Clerk is using the original—look at page 27, line 6, and I will now ask you whether or not in your deposition you did not testify in this way: [137]

“Q. And the accident happened about how far from where you were at that moment; in other words, having in mind your position?

“A. Well, to the best of my knowledge, about 300 yards.



(Testimony of Oran Davis.)

“Q. About 300 yards? A. Yes, sir.

“Q. Or 900 feet, something like that?

“A. Something like 900, something like that.”

Did you so testify?

A. I so testified there at that time.

Q. Now, Mr. Davis, when your deposition was taken you weren't served with subpoena, were you; you were not served with a subpoena when your deposition was taken? A. No.

Q. You appeared for the taking of that deposition by arrangement with Mr. Myers, did you not?

A. No.

Q. Who made the arrangements?

A. I don't know. I was called.

Q. You came up to Oakland?

A. I came to Oakland. The first deposition was somebody in Modesto, some insurance company in Modesto, an adjuster.

Q. I am talking about the one in Oakland.

A. Someone called me. I don't remember just now; I don't remember. I was called in to Oakland. [138]

Q. Before your deposition was taken, did you discuss your testimony with anybody? A. No.

Q. Nobody at all? A. No.

Q. Did you discuss it with Mr. Myers at all?

A. No.

Q. Did you discuss it with Mr. Myers?

A. No.

Q. Did he ask you what you knew about the accident? A. No.

Q. Did he ask you whether you knew anything about it at all? A. No.

(Testimony of Oran Davis.)

Mr. Dunne: No further questions.

Further Redirect Examination

Q. (By Mr. Myers): Mr. Davis, with reference to the direction of the sun, so there will be no doubt about that, your Honor, is there a crayon or something we might use to mark that map?

The Court: He wants a blue pencil or red pencil.

Mr. Myers: A blue pencil.

Q. What direction was the sun shining from on the morning of this accident, generally?

A. Well, generally, easterly, a little southeasterly direction.

Q. So if you were going up North Avenue, it would be a little [139] to your right but facing you?

A. Yes.

Q. If you were going up Beckwith Road, it still would be a little to your right but facing the driver?

A. Yes.

Q. So if we put the sun up in here, would that be about right?

A. The sun wasn't so high.

Q. Well, how would you—

A. That would be about right.

Q. Let's put it this way. Was the sun high enough so it shone above your face as you drove your car east on North Avenue or was it low enough so it shone in your face?

A. It shone in my face.

Q. With reference to your deposition that was taken in the office, Mr. Davis, do you know who it was who got in touch with you first?

(Testimony of Oran Davis.)

A. I believe Mrs. Souza got in touch with me.

Q. Was that the first time that you were asked to come to my office?      A. Yes.

Q. Then when you got to my office did we talk about the facts of what you knew about the accident?      A. No.

Q. Didn't I ask you questions about it and you told me what [140] you knew about the accident?

A. Yes, in the deposition room.

Q. But before the deposition was taken didn't I ask you questions about it and didn't you tell me what you knew about it?

A. You asked me what I knew about the accident, yes.

Q. And you told me about it, did you not?

A. Yes.

Q. You came up here again prior to this trial?

A. You mean this time?

Q. Yes.

The Court: He has not asked him about that. He asked him about the deposition.

Mr. Myers: All right. Thank you, your Honor. That is all.

Mr. Dunne: That is all.

The Court: Just one minute. Let me understand something. I don't quite get the idea of what you mean by haze. You say the sun was high. What time of the morning was it?

A. 9:00 o'clock.

Q. It was a bright day, was it not?

A. Yes, it was a clear day.

(Testimony of Oran Davis.)

Q. What do you mean by haze?

A. Well, just a kind of steamy haze from the ground.

Q. What was it, steamy haze rising from the ground?      A. Yes. [141]

Q. Is that what they call a valley tule fog?

A. I suppose so.

Q. But it was early in October. It does not get cool down there early in October, does it, so there is no such variation between night and day that you get land fog that sticks to the ground the way it does early in the spring?

A. Well, it was that way that morning.

Q. It was?      A. Yes.

Q. What was it; was it a mist or fog—

A. A little ground fog, I guess, or haze, steamy ground.

Q. It wasn't from the atmosphere as though it were going to rain?      A. No.

Q. You would not call it a fog as they would call it in Los Angeles?

A. No. I would call it a haze.

Q. Atmospheric—shall I use a big word?—atmospheric haze?      A. Something like that.

Q. Was it high? How high off the ground?

A. I would say 12 or 15 feet.

Q. Above the ground?

A. Well, it was that way above the ground.

Q. Was it solid to the ground?

A. No. [142]

Q. Was it like they call a pea soup fog—they don't have those in San Francisco—I am just try-

(Testimony of Oran Davis.)

ing to find out what you mean by haze. Everybody is talking about it. Early in October, it is in the tropical part of California where it still is warm during October.

A. That particular morning it was just a kind of low-hanging, little bit of haze above the ground. I will say it was above the ground from 5 to 6 feet up to about 12 to 15 feet.

Q. Did it affect visibility? A. Yes.

Q. To what extent did it affect visibility?

A. I don't know; I couldn't see against the sun.

The Court: That is all. I just wanted to know what he meant by haze.

Mr. Myers: Just one more question.

Q. With the sun, then, over here to the east or southeast, and you looked to the left, in other words, you look away from the sun. Will you tell us whether or not your visibility was better?

A. Well, I could see further away from the sun.

Mr. Myers: That is all.

Q. (By Mr. Dunne): Was the sun casting any shadows that morning?

A. I suppose it was.

The Court: Well, do you know? Do you remember whether it [143] was?

A. I don't remember if it was making shadows.

Q. (By Mr. Dunne): Do you remember any shadows from your car?

A. I didn't look at the shadows of my car.

Q. What kind of a car were you driving?

A. Ford.

Q. Open or closed? A. Closed, Ford sedan.

(Testimony of Oran Davis.)

Q. Did you notice any shadows from the sun inside the car?

A. Well, I know the sun was shining, but I don't think I had any shadows in there. I don't remember whether I had any shadows in there or not.

Q. Was it shining inside the car?

A. I suppose it shined through the windshield.

Mr. Dunne: I have no further questions.

The Court: You called it a haze. Let me ask you this: Was it misty or was there any mist on your windshield?

A. No. It was no mist; it was just, well, it would dim your windshield a little, but still a haze—

Q. Still getting back to the same thing.

A. When you looked off, out against the sun, you couldn't see; it was just a haze covering—

Q. What time did you get up that morning?

A. Four o'clock.

Q. You have an early dawn? [144]

A. Yes.

Q. At that time of the year you have an early dawn. What time was it light?

A. I don't know. An early dawn, I don't know just when.

Q. About 5:00 o'clock it is light at that time of the year?      A. Well, not in October.

Q. What time on that day, if you remember?

A. I don't remember. I imagine about 6:00.

Q. About 6:00. So there were three hours of light before this happened?      A. Yes.

Q. Do you know what the atmospheric condi-



(Testimony of Oran Davis.)

tion was, say, at the time you got up, say at 6:00 o'clock or at 7:00 o'clock, that is, compared with 9:00 o'clock?

A. I got up—I milk cows. I got up at 4:00 o'clock and, of course, at that time I didn't pay no attention to the atmospheric condition but on that morning, you are always irrigating and you always have steam, fog; it was not a high fog.

Q. Would you say that existed early in the morning? A. Yes.

Q. Do you remember observing it?

A. No, I don't remember observing it.

Q. But you would think that it probably existed for some time before 9:00 o'clock?

A. Naturally. [145]

Q. How long?

A. I would say that the sun comes up and warms up.

Q. What hour would that be?

A. I don't know exactly when the haze started, I don't remember that day, but I know—All I know is it obstructed my view that morning.

The Court: That is all.

Mr. Myers: That is all.

Mr. Dunne: That is all.

Mr. Myers: May the witness be excused?

The Court: Yes. He may be excused, to return to his work.

Gentlemen, we have concluded with this witness.

Ladies and gentlemen, we are about to take an adjournment until 2:00 o'clock this afternoon. The Court admonishes you not to converse among your-

selves or with anybody else on any subject connected with the trial of the case or to form or express an opinion on it until the case is finally submitted. As you were told, when you return, go to the jury room and we will call you when we are ready to proceed.

(Recess was taken until 2:00 o'clock p.m.)

Afternoon Session, Wednesday, July 21, 1948,  
2:00 p.m.

The Court: All right, gentlemen, proceed.

Mr. Myers: At this time, your Honor, I would like to read in evidence the deposition of H. J. Johnson, fireman; Mr. Dunne has agreed to read the questions and I shall read the answers.

The Court: Very well.

Mr. Dunne: There is no point in reading the preliminaries.

Mr. Myers: Yes, your Honor, if that is agreeable.

The Court: Merely summarize for the record that the deposition was taken at whose request and why he is not present and then proceed with the examination. Eliminate the preambles, the notations of the notary and so forth.

Mr. Myers: We start in at page 8.

Mr. Dunne: The deposition was taken by stipulation by the plaintiff of Mr. Johnson, who was originally named as a defendant, and the preliminaries were that counsel on both sides advised him as to what his rights were, his rights to make objections, and that we had to have his waiver of

signature to the deposition as well as our own consent to that. He consented to that and consented to the taking of the deposition.

Mr. Myers: That is correct, your Honor.

Mr. Dunne: The deposition shows that it was taken under 2055, your Honor. We do not concede at this stage of the case that [147] counsel is entitled to offer it under 2055. There is a recitation in the deposition to that effect. The case has now been dismissed as to this man.

Mr. Myers: He was a party defendant, your Honor, when the deposition was taken.

The Court: You are offering him as your witness and not as an adverse party because, you see, gentlemen, we are no longer governed by 2055; we are governed by 43(b), which is similar but would not cover a situation of a person who is not an adverse party or comes under the head of a managing agent so as to bind the party.

Mr. Myers: I think, your Honor, the preliminaries if read would show that Mr. Dunne and I had agreed upon that, that whatever the situation was at the time of trial we would let the Court rule accordingly.

The Court: Maybe I had better explain a little to the jury what is meant by 2055 and the other rule mentioned. We have a rule in the State and a similar rule in the Federal Courts, ladies and gentlemen, that you can call your adversary as a witness and then submit him to cross-examination and not be bound by his testimony. Ordinarily when a party offers a witness in evidence, that party is bound by his evidence, except under certain cir-

cumstances, but when you call an adversary, under one of these rules you are not bound by his testimony. You can call him and see what you can get out of him and then [148] you can contradict him if you want to. That applies, however, only to your adversary, a party who is your opponent in the law suit. If he is not an opponent in the law suit then, of course, you offer his testimony under the same condition as you offer the testimony of any other witness, that is, with the belief that his testimony is binding on you, except under certain circumstances, where you may impeach his testimony if you are taken by surprise by what he says and things like that. That is what counsel are referring to. This gentleman was a party to the action. The action now has been dismissed as to him, and therefore this testimony is offered by the plaintiff in support of their cause.

Mr. Dunne: This first part is an examination by Mr. Myers and I am reading the questions that Mr. Myers put and Mr. Myers will read the answers given by the witness.

The Court: All right.

(The deposition of H. J. Johnson was then read by counsel for the respective parties, during which the following exhibits were introduced):

Mr. Myers: Your Honor, we will offer this photograph in evidence as plaintiff's exhibit next in order, which counsel says is a photograph of the engine involved in the accident.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.) [149]

Mr. Myers: Do I understand counsel is not inquiring into the motives then?

Mr. Dunne: No, the only part of the impeachment is the statement which is attached to the original deposition, if Your Honor please.

The Court: All right. Now you may read the statement.

Mr. Dunne: May we have it detached and marked here?

The Court: I think you had better detach it. The jurors may want to see it and, as you know, we never send depositions out to the jury.

Mr. Myers: May I ask, your Honor, are there any other exhibits there besides the statement?

Mr. Dunne: I think just the photograph.

(The statement referred to was thereupon received in evidence and marked Defendant's Exhibit Q, after the marking of which it was read by Mr. Dunne.)

The Court: Call your next witness.

Mr. Myers: May I look at the deposition a moment, your Honor, and see what photographs are attached? There is just one and we have already put that in evidence.

Your Honor, either now or at your Honor's convenience I would like to pass that one photograph to the jury showing the engine that was involved in this accident.

The Court: Let us have another witness now



just before we take a recess. You can complete your case with your photographs. [150]

Mr. Myers: We can take up two or three matters. My next witnesses will be on an entirely different line. There are two or three matters I would like to bring up. One is with reference to the speed restriction which counsel and I have agreed upon, as to what the fact is. I do not know whether counsel is agreed that I am entitled to place the fact before the Court or not, but it is the company's own speed restriction.

The Court: I do not think it is a question of discussion, gentlemen. It is a question of instructions.

Mr. Myers: I want to offer that speed restriction of the company in evidence at this time.

The Court: Didn't you give an instruction about the regulations of the company?

Mr. Myers: Not including the speed restrictions, your Honor. That is a matter that is covered by company bulletin. It is not in the rule book, and it is a fact that we have agreed upon. Can we stipulate as to what speed restriction is?

Mr. Dunne: I can stipulate to the fact, but before that I make the objection that it is incompetent, irrelevant and immaterial. It might be material in an employee case but not as to an outsider who knows nothing about it.

Mr. Myers: It is material, your Honor, from the standpoint of the climatic conditions. I think when the case is fully presented the speed will be an important element in the case and that is why



we would like to show what that speed [151] restriction was.

Mr. Dunne: Our position is that the standard is fixed by law. It is a question of ordinary care, but whatever rules we may have adopted for our own internal management may be more or may be less than that standard.

The Court: If you will show me the bulletin, I will be glad to look at it and then I will determine.

Mr. Myers: Your Honor, we do not have the bulletin. It is a fact that there is a bulletin somewhere that covers the matter and counsel has agreed to it.

Mr. Dunne: If the fact is proper, I will agree to it.

Mr. Myers: So far as the rule of speed restriction or any other company rule not being admissible in this case, there is no question about the fact that the company rules apply for the benefit of the general public as well as the company employees themselves. There are authorities on that, your Honor.

The Court: It all depends on the rule. It all depends on the nature of the rule as to what the object of it is. There are no restrictions on railroads outside an incorporated city of the State of California, and I shall so instruct the jury. But, of course, they have to use the usual standard of care in determining the speed at which they pass.

The difficulty is, I may say, both of you are mixed in these instructions and have given me a problem with respect to [152] a lot of laws that

apply to street railways within cities and they have no application whatsoever here. We are not dealing with a city. We are dealing with a country crossing as to which there is no restriction in the law of California. The same applies to other matters that counsel for the defense has adverted to, such as responsibility for control and the like, persons riding in an automobile and so forth, which do not have application.

Mr. Myers: But, your Honor, the application of the speed restriction in this particular territory is fixed by time-tables.

The Court: I do not think any rules that they would have for their own guidance with the idea of covering so much territory have a bearing on this at all. The only question is whether there is any legal restriction, and there is no legal restriction. Both of you have prepared an instruction, and I am having them both copied; I am going to compare them, and they are so much alike I do not know which I will give. I may give one or the other. That being the law, I do not think any regulation applies. When it comes to bells, that is a different proposition. Then there is a duty to ring a bell and the method that you adopt is material, how to ring a bell, but that is different. Those company rules with regard to the manner of ringing the bell I shall give, but we are in a different field when we talk about the speed because there is no speed [153] regulation of a steam railroad by the law of the State of California. The only restrictions there are are those provided by municipal ordinances in large cities where the railroad passes

through the town, and as you know, in some of the cities like Los Angeles the railroads go through one of the very busy streets, Los Angeles streets. They still go through there, and we have regulations of speeds there and those would be material if an accident happened within the corporate limits of that municipality. This did not happen within the corporate limits of Modesto.

Mr. Myers: Will your Honor keep your mind open on that until I can produce the authority on that subject?

The Court: I have not ruled. My view at the present time is that it is not material. Before the case is over, if you will show me a case dealing with speed—I do not want any others——

Mr. Myers: Very well, your Honor.

Passing on to the next matter, your Honor, we have stipulated as to certain rules that do apply, that were in full force and effect at the time of the happening of this accident. The first is rule 14.

Mr. Dunne: We will reserve the objection that it is incompetent, irrelevant and immaterial.

The Court: What does that relate to?

Mr. Myers: Rule 14 has to do with the type of whistle [154] that is to be blown at the railroad crossing.

The Court: You have covered that by an instruction. I think it is much better to let me handle it by an instruction than to offer evidence of it. Then the jury will have it before them because, as you know, all my instructions are written and then if I send them out they will have them in the form in which they are written.

Mr. Dunne: Severally as to each of the proposed rules our objection is they are incompetent—

The Court: Have you a copy of the instruction? I am sorry, gentlemen. My instructions are in the hands of secretaries who are copying them.

Mr. Myers: I have all five rules here, your Honor, that I would like to put in evidence. I have submitted an instruction on them, and those are all rules that apply to this particular case. [155]

The Court: I will say right now I will not give 864 or 874. They have nothing to do with the matter, as there is no showing that any outsider had anything to do with the operation of the engine, so as to bring any such rule into play, but I am inclined to think in view of the fact that a whistle is required to be blown by law the regulations going into detail are material. They don't have the importance, for instance, as that what you call the rules of the road, that the Maritime Law have; it is between ships at sea.

Mr. Dunne: They have the force of law, your Honor.

The Court: They have the force of law. Also the man who hears them knows what they mean. They are like a wigwag signal given by a man in the signal corps. The man to whom he gives it knows what it means. Nevertheless, they are material, showing that the company recognizes the obligation and specifically calls attention of the company. However, if you want—

Mr. Dunne: If your Honor please, we will make the formal objection that they are incompetent, irrelevant, and immaterial.

The Court: That's right. However——

Mr. Dunne: And not evidentiary matter.

The Court: I will say this: If I give them—I have not seen the instructions as a whole, but when I see them it may well be when I give this as an instruction I will modify [156] it. That is, ultimately, in a case like this, the question whether he gave the proper signal, it is not that question in a case like this. The question is, did he give it, or did he not give it? In other words, if he gave one instead of two it is not material, unless by giving two he could have avoided the accident.

Mr. Myers: I agree with that.

Mr. Dunne: I was about to say we will make an objection it is incompetent, irrelevant, and immaterial, but will stipulate that the showing may be made as far as the evidence is concerned of the three rules that counsel on the other side has suggested that your Honor give instructions——

The Court: All right. You can cut off the top of the paper and the bottom of the instruction and I will allow you to either put it in as an exhibit or read it to the jury, rules 14, 30 and 31.

Mr. Myers: Thank you, your Honor.

The Court: I will amplify later on the instructions. I will repeat now what I have said, and counsel agrees, that the important part of this case is whether it was given or not given, and not so much whether he gave one instead of two, unless the evidence shows that by giving a single signal the warning might have been heeded. You may be satisfied from the evidence that regardless of



whether it was given, or not, because somebody said he didn't hear it he wouldn't [157] have heard it, or that it should have been louder. That is up to you to determine. I am merely commenting on the materiality of these particular rules.

Mr. Myers: I will just read the rules into the record. Rule 14 of the Transportation Department, Southern Pacific Company, in full force and effect at the time of the happening of this accident provided as follows:

"Rule 14: A whistle of two long, one short and one long blast will be sounded when 'approaching public crossings at grade, tunnels and obscure curves; to be commenced sufficiently in advance to afford ample warning but not less than  $\frac{1}{4}$  mile before reaching a crossing, and prolonged or repeated until engine has passed over the crossing'."

"Rule 30: The engine bell must be rung when an engine is about to be moved; while passing through tunnel; while approaching public crossings at grade, beginning sufficiently in advance to afford ample warning, but not less than  $\frac{1}{4}$  mile before reaching such crossing; and continuing until the engine has passed over the crossing; and otherwise when necessary as a warning signal."

"Rule 31: The whistle must be sounded at all places where required by rule or law or to prevent accident."

The Court: I think we better take a short recess now and then we will call the other witnesses.

(Recess.) [158]



The Court: Proceed.

Mr. Myers: Mrs. Geraldine Souza, will you step up, please?

GERALDINE SOUZA,  
one of the plaintiffs, called in her own behalf;  
sworn

The Clerk: Will you state your name to the court and jury?

A. Geraldine Souza.

Direct Examination

Q. (By Mr. Myers): Where do you reside, Mrs. Souza? A. In Modesto.

Q. How old are you? A. 22.

Q. How old were you in August of 1945?

A. 20.

Q. I am sorry—August, 1946. A. 20.

Q. You were 20 years old; is that right?

A. Yes.

Q. In other words, you were 20 years old when your action was filed; is that correct?

A. That is correct.

Q. During his lifetime, what was your husband's name? A. Edward. [159]

Q. Edward what? A. Anthony Souza.

Q. Edward Anthony Souza. He was involved in an accident on October 11, 1945; is that true?

A. That is correct.

Q. Prior to that time, Mrs. Souza, what was Mr. Souza's occupation?

A. Well, he had a ranch, about 40 acres in alfalfa, and then he ran a hay press.

(Testimony of Geraldine Souza.)

Q. He had this hay press business; is that right?      A. Yes.

Q. When and where were you married, that is, you and Edward Souza?

A. In Manteca, in October—Pardon me, March.

The Court: Speak a little louder.

A. In Manteca, March 18, 1943.

Q. (By Mr. Myers): After you were married in March, 1943, you went to live where?

A. At his folks' home.

Q. That was at the ranch near Modesto, is that correct?      A. Yes, sir.

Q. Were there any minor children the issue of this marriage?      A. Yes.

Q. Will you just give their names and ages, please?

A. Well, Lawrence is 4 and Richard is 3. [160]

Q. At the time that this accident happened how old was Lawrence?      A. Two.

Q. Two years old. Is Lawrence a perfectly healthy child?      A. No, sir.

Q. Just tell us about him.

A. Well, he is totally crippled.

Q. Totally crippled?      A. Yes.

Q. Was that because of some accident in birth?

A. Yes, the doctor injured him at birth.

Q. Is his condition that known as spastic paralysis?      A. Yes.

Q. Because of that fact he has required more care than the other child?      A. Yes.

Q. During your husband's lifetime what, if anything did he do with reference to helping take care of that child?

(Testimony of Geraldine Souza.)

A. Well, he cared for him practically the time he was home when he wasn't working on the hay press. He helped, always helped with the baby when he was home, especially at night.

Q. Has this child ever been able to get around? In other words, under his own locomotion, at all?

A. By rolling on the floor, is all.

Q. By rolling on the floor? [161]

A. Yes, sir.

Q. Are there any artificial braces of anything of the sort the child wears?

A. Last week he got braces, but he can only have them on for a half an hour a day.

Q. During this whole period of time, Mrs. Souza, has he been able to get around at all except either by your husband's help when he was alive, or your own help?

A. He has never been able by himself, no.

Q. Do you know approximately what your husband's earnings were up to October 11, 1945?

A. From \$250 to \$350 a month.

Q. Of that how much, if any, did he spend or give you for the support of yourself and your minor children?

A. Practically all of it.

Q. What would be your best estimate as to the amount he actually gave you for your support and for the children's support.

A. At least 90 percent.

Q. Of what? A. His earnings.

Q. Of from \$250 to \$350 a month?

(Testimony of Geraldine Souza.)

A. Yes; it varied.

Q. Would that be a fair estimate through the years that you were married? [162]

Q. From the standpoint of the other children, or the other child, rather; the other child is a boy, too?

A. Yes.

Q. And a perfectly normal baby?

A. Yes.

Q. Your spastic child, does that child require considerable more care than the other child?

A. Yes.

Q. Do you know what the future is going to be with reference to caring for that child?

A. Well, they are doing a lot for the spastic children, and I am hoping there is a lot can be done for him, yes.

Q. Does that entail any expense?

A. Definitely.

Q. What do you do in that regard? Do you send the child to a school, or something of the sort?

A. Well, yes, they have to be under physicians and trained nurses care for at least three years.

Q. What does that cost, monthly, in order for that?

Mr. Dunne: It is a question of benefits from the father, not needs.

The Court: Read that question, please.

(Question read by the reporter.)

Mr. Myers: My point, I want to prove what the cost of the special training for this spastic child would be, that [163] it was such care that her husband would have afforded had he lived.

(Testimony of Geraldine Souza.)

The Court: I don't think you can go into the cost. You can describe what is needed, but you can't go into cost, because you are going into a realm of speculation dependent upon the——

Mr. Myers: Very well, your Honor.

The Court: As to what is necessary in the future, they may get it for nothing; they might get it for a lot of money. In that event it is not a material matter in a case like this. In other words, they are entitled to recover, assuming that there is a recovery, the jury has a right to consider the rights they would have got from the support of the husband within the limitation of his earning possibilities.

Mr. Myers: All right, your Honor.

Q. In any event, in order to develop this child to a point where you can get the best out of him, in view of his condition, I mean from the standpoint of his being able to do anything in the future, he must have this medical supervision; is that the point?

A. That is the point.

Q. And they do have school, a medical school, or whatever you want to call it, for that purpose, is that true?

A. That is true.

Q. Now, Mrs. Souza, how did you and Edward Souza get along [164] during your lifetime.

A. Wonderfully.

Q. Was he a good family man?

A. Yes, very good.

Q. At night time did he go out or did he stay home and help you take care of the children?

(Testimony of Geraldine Souza.)

A. No; he always stayed home.

Q. When he did go out did he go out by himself?      A. No.

Q. You went with him?      A. Yes.

Q. What else around the home did he do, if anything?

A. Well, if I was taking care of the baby he would do all my housework, and if I was doing the housework he would take care of the baby.

Q. You were happy with your husband, were you?      A. Very happy.

Q. He was happy with you?      A. Yes.

Q. Did you love your husband?

A. Very much.

Q. Did he love you?      A. Yes.

Q. With reference to the funeral expenses, I have a bill here, Mr. Dunne—pardon me, your Honor, except that I would like [165] to submit the bill to Mr. Dunne through your Honor, and I think we can stipulate to it.

Mr. Dunne: If you will state the amount I will accept your statement.

Mr. Myers: The bill is in the sum of \$1047.38. Those were the funeral expenses?      A. Yes.

Mr. Myers: That's all.

#### Cross-Examination

Q. (By Mr. Dunne): Mrs. Souza, you said your husband turned over, did he, to you about 90 percent of his earnings?      A. Yes.

Q. Then you used those for general household purposes?      A. Yes.



(Testimony of Geraldine Souza.)

Q. For the care of the family?

A. For the whole family.

Mr. Dunne: No further questions.

Redirect Examination

Mr. Myers: Just a moment, your Honor. There is another question.

Q. The last time you saw your husband alive was when?

A. Oh, before nine o'clock, when he left the ranch.

Q. On October 11th?

A. On October 11th. Oh, no. I saw him arrive at the hospital—I am sorry—but he did not recognize me.

Q. Before the accident, then, you saw him where? [166]

A. Before the accident?

Q. Yes.

A. I saw him at home.

Q. Do you know where he was going that morning?

A. He was going with Johnny.

Q. He was not going to town?

A. Johnny wanted him to see the ranch; he wanted him to look at a ranch and Johnny asked him to go along.

Q. So he went; is that it?

A. Yes.

Mr. Myers: That is all.

Mr. Dunne: No further questions.

The Court: Step down.

MRS. JOSEPHINE SOUZA,

one of the plaintiffs, called in her own behalf;  
sworn

(Testimony of Mrs. Josephine Souza.)

The Clerk: Will you state your name?

A. Mrs. Josephine Souza.

Direct Examination

Q. (By Mr. Myers): Mrs. Souza, how old are you? A. 52.

Q. On October 11, 1945, how old was Mr. Souza, that is, Antonio Azevedo Souza? A. 57.

Q. What? [167] A. 57.

Q. Where was he born, do you know?

A. He was born in the Azores.

Q. When? A. In 1888.

Q. Do you know when he came to this country?

A. Came as a boy; I don't remember what age; around 17, I think, or 18. I don't know exactly.

Q. Where were you born?

A. I was born in Piedmont.

Q. Here in the East Bay? A. Yes.

Q. When and where were you and Mr. Souza married? A. In Modesto.

Q. When? A. In 1919.

Q. Then where did you make your home after your marriage? A. In Modesto.

Q. Have you lived on a ranch practically during your entire married life? A. Yes.

Q. How many children did you have?

A. Six.

Q. Six children that were born out of this marriage: Is that right? [168] A. Yes.

Q. Will you start in with the oldest one and go down and give us their names and their ages, please, Mrs. Souze? The first one was who?

(Testimony of Mrs. Josephine Souza.)

A. Their ages now, or at the time of the accident?

Q. Give us their ages at the time of the accident.

A. Edward was 24.

Q. That is Edward Anthony Souza?

A. Edward Anthony Souza.

Q. He is the son that was also killed in this accident in which your husband met his death?

A. Yes.

Q. He was 24 at that time? A. Yes.

Q. Who was the next? A. Mary Adele.

Q. Mary Adele. What was her age at that time?

A. She was 22.

Q. 22 years old. The next child was who?

A. John; John was 19.

Q. John, the young man who is in court with you? A. Yes.

Q. He was 19 years old then? A. Yes.

Q. Who was the next one? [169]

A. Lucille; she was 17.

Q. Then the next one?

A. Then James was 16.

Q. James was 16?

A. And Benjamin was 9.

Q. He was the youngest? A. Yes.

Q. At the present time how many of them are minor children, right now? A. Three.

Q. That is Benjamin, James——

A. And Lucille.

Q. And Lucille? A. Yes.

Q. These children all live with you, do they?

(Testimony of Mrs. Josephine Souza.)

A. Yes.

Q. Now, Mrs. Souza, at the time of your husband's death where were you living?

A. In Modesto.

Q. What? A. Modesto.

Q. Still living at Modesto, were you?

A. Yes.

Q. And on what ranch?

A. Well, it was on the Toomes Road. [170]

Q. How long had you lived on that ranch?

A. Now, or before the accident—living there 20 years.

Q. Before the accident you had lived there 20 years or 18 years? A. 18.

Q. You lived there 18 years before the accident; is that right? A. Yes.

Q. Mrs. Souza, you and your husband and your entire family lived there? A. Yes.

Q. What was your husband's occupation?

A. He was a dairyman.

Q. Do you know what his average monthly earnings were before October 11, 1945?

A. About \$300 a month.

Q. Of that amount of money what portion of it did he give you to afford you with your support and maintenance as well as that of the children?

A. About one-third.

Q. What? A. Two-thirds.

Q. Two-thirds of that amount? A. Yes.

Q. Was Mr. Souza a man who stayed home, or did he go out, or what was the situation.

(Testimony of Mrs. Josephine Souza.)

A. He stayed home. [171]

Q. Did he go out without you?

A. Very seldom, except on some business when I was not needed, and I had so much to do at home with the children I had better stay home.

Q. When he went out socially did he go with you?      A. I always went.

Q. Was Mr. Souza a good family man?

A. He was, very much so.

Q. Besides his ranch activities did he do anything around the home, at all?

A. Yes, he did.

Q. How did you and Mr. Souza get along?

A. Happy.

Q. Mrs. Souza, as a result of his accident, I have a bill here from the Sovereign Funeral Home in the sum of \$1157.38. Is that a bill which you incurred as a result of this accident for burial services for your husband?      A. Yes.

Q. Mrs. Souza, did you love your husband?

A. Yes.

Q. Did he love you?      A. Yes.

Q. Do you miss him?      A. I do.

Mr. Myers: That is all. [172]

#### Cross-Examination

Q. (By Mr. Dunne): Mrs. Souza, the two-thirds of the \$300 a month that your husband gave you, you used that, then, for the benefit of the whole family, I take it?      A. Yes.

Q. Did you own that ranch?      A. Yes, sir.

Q. The \$300 a month that you used, that was the return from the operation of the ranch?

(Testimony of Mrs. Josephine Souza.)

A. Yes.

Q. You still have that ranch? A. Yes.

Mr. Dunne: No further questions.

Redirect Examination

Mr. Myers: Your Honor, I am sorry, there is just one or two other matters that we might determine while the witness is on the stand.

Q. You were in court when Mr. Davis, Oran Davis, testified; when he testified concerning the accident you were in court? A. Yes.

Q. You heard him say that he was contacted by Mrs. Souza. A. Yes.

Q. You were the Mrs. Souza who contacted him? A. Yes.

Q. How did you happen to contact him; when did you know about him? How did you come to know about him? [173]

A. Well, the daughter-in-law where he was employed knew my daughter.

Q. What is her name?

A. The daughter-in-law?

Q. Yes. A. Mrs. Freeman.

Q. That is at the Freeman Dairy, where Mr. Davis worked? A. Yes.

Q. Go ahead.

A. She told my daughter that this man that was hired by her father-in-law told them about the accident, that he saw it.

Q. Then you got in touch with him

A. Yes.

Q. How long was that before or after you saw me for the first time?



(Testimony of Mrs. Josephine Souza.)

A. A few months, I guess; I don't remember.

Q. Three months before you ever saw me?

A. Something like that.

Q. That is how you happened to contact him?

A. Yes.

Q. Was it at your request that he appeared in this case to testify? In other words, you requested his presence, did you? A. Yes.

Mr. Myers. That is all. [174]

### Recross-Examination

Mr. Dunne: I neglected to ask you one question. Is your daughter, Mary Adele, married?

A. No, she is not.

Q. How about your daughter Lucille?

A. She is at home. She just graduated from high school.

Q. She is not married, either? A. No.

Mr. Dunne: Thank you.

The Court: Step down. [174-A]

Mr. Myers: I think there is a matter I should ask Mrs. Souza about, but I can recall her. Pardon me, your Honor. You know, you get in a bad habit in the state courts.

The Court: If I come here often enough, I will cure you of it.

Mr. Myers: I would like to ask counsel through your Honor——

The Court: However, I want to say this. I was in the state courts for eight years and that method was not used in my court. In other words, I conduct a court now the way I conducted it in 1927

and 1928 when I first became a judge of the Superior Court. It is just different methods that different judges allow.

Mr. Myers: I was before your Honor in 1927.

The Court: I presume you tried your first case before me.

Mr. Myers: That is right. I would like to ask your Honor and counsel if he expects to call Mr. Aguers.

Mr. Dunne: I do.

Mr. Myers: In view of that, your Honor, if you will step back up, Mrs. Souza, I will ask you one or two questions regarding that.

#### JOSEPHINE SOUZA

was recalled as a witness and having been previously duly sworn, testified as follows: [175]

#### Redirect Examination—(Resumed)

Q. (By Mr. Myers): Mrs. Souza, do you recall on some occasion a Mr. Aguers from the Southern Pacific Company, claim agent for the Southern Pacific Company, came to your home?

A. Yes, I do.

Q. Do you know how long after the accident that was? A. Just a few days.

Q. When he came to your home, will you tell His Honor and the jury what, if anything, was done at your home with Mr. Aguers?

A. Well, he wanted my son to give him a statement, and he told him that he didn't care to discuss the matter at that time, and he said that he knew how he felt, that he lost his own dad when he was a boy, and so he would come back later. in about

(Testimony of Josephine Souza.)

Q. He never did come back, and was there any statement written in your presence?

A. No, sir.

Q. What is that?

A. No, sir, there was not.

Q. And were you present at all times when Mr. Aguers was present?      A. Yes, sir.

Q. And when Mr. John Souza, your son, was present?      A. Yes, sir.

Mr. Myers: That is all. [176]

The Court: Any questions, Mr. Dunne?

Mr. Dunne: I have no questions, no, your Honor.

Mr. Myers: Other than the matter of the speed restriction, your Honor, we rest.

The Court: What do you mean by the matter of speed restrictions?

Mr. Myers: You will remember I offered in evidence the speed restriction that I am going to try to give your Honor some authorities for my position.

The Court: If you find any authority, I will reopen the case to allow that. For the present I will rule it is not material because of the state law.

Mr. Myers: With that, your Honor, the plaintiff rests.

(Plaintiff rests.)

Mr. Dunne: If your Honor please, I have a motion to make.

The Court: All right, you may make it right here and we will not bother the jury.

(Thereupon counsel for the respective parties and the Reporter approached the bench, and outside of the hearing of the jury the following occurred:)

Mr. Dunne: In each of the matters of Angelo and John Martin Souza and the death of the father Antonio Azevedo Souza, in those two cases we make a motion of dismissal and non-suit on the grounds, first, that the evidence shows contributory negligence on the part of John Martin Souza, the son, and under [177] the provisions of the Motor Vehicle Code of the State of California, he being a minor and having his father's consent, his negligence is imputed to the father, so that any negligence on his part as far as recovery upon the ground that he failed to exercise proper care in looking or listening for an approaching railroad train, and upon the ground that there is no showing of any negligence upon the part of the defendant.

The Court: I think the matter presents a factual situation for the solution of the jury. I may say I think this is the third one of out 12 I have ever allowed to go to the jury, but I am satisfied that so far as the question of negligence is concerned, it presents a factual situation as to whether he stopped or not, and there is testimony that he did stop, and there is testimony that the bell did not ring and the whistle was not blown, and that, *prima facie*, is sufficient to take the case to the jury.

As to the other matter, I will discuss it more fully. It relates to the matter of instructions. But

the showing is that this was his automobile, and as he had no license, his father did not sign any agreement.

Mr. Dunne: There are two Code sections: One is the signing of the agreement, the other is permitting him to drive with the parents' consent.

The Court: But that was the boy's own car, not the father's car. [178]

(Discussion off the record.)

The Court: The motion for dismissal is denied.

(The following proceedings were had in the presence and hearing of the jurors:)

The Court: I may explain to you we are not keeping anything away from the jury, but there are all manner of matters that are supposed to be taken up between court and counsel. For instance, before the arguments are made, we may have to take an hour to discuss the proposed instructions because I am supposed under the law to let them know what I am going to do about certain instructions that both sides suggest, so that they will know before they argue. You will have to wait until we get through with that. You have a province and I have a province. I can't invade yours and you do not dare invade mine. So this method is easiest, rather than sending you out and bringing you back, so many times we go into a huddle and dispose of these matters so that counsel may place upon the record the first matters that are supposed by law to be done at certain times, otherwise they can't question them later on.

Mr. Dunne: If your Honor please, I should like to ask counsel whether he is willing to stipulate that Engineer Glanville died last November.

Mr. Myers: That is my understanding. I will take your word for that.

Mr. Dunne: Secondly, I offer in evidence two other [179] photographs of locomotives 2487. Those are the ones I referred to when I handed the first one to counsel on the other side.

(The photographs referred to were thereupon received in evidence and marked Defendant's Exhibits R and S.)

BERNARD GEORGE AGUER,  
was called as a witness on behalf of the defendant,  
and being first duly sworn, testified as follows:

The Clerk: What is your name, sir?

A. Bernard George Aguer.

Direct Examination

Q. (By Mr. Dunne): Mr. Aguer, what is your business?

A. I am employed as a claims adjuster by the Southern Pacific Company, sir.

Q. Located where?

A. At the present time at 65 Market Street, San Francisco.

Q. In October of 1945 what was your business?

A. I was employed as a claims adjuster by the same company, field man.

Q. Where were your headquarters at that time?

A. I was what was called a Western Division man. I worked out of Oakland.



(Testimony of Bernard George Aguer.)

Q. Did you have occasion to make some investigation, without stating what it was, in connection with a crossing accident at the crossing of Beckwith Road just northwest of Modesto and the [180] Southern Pacific tracks, an accident that occurred on October 11, 1945? A. I did.

Q. Did you, in that connection, call at the home of the family, some of whose members were involved in that accident? A. I did.

Q. When was that that you called there?

A. Approximately a week or better after the accident.

Q. Did you make any note or memorandum of anything that occurred upon that visit?

A. I took a statement from the young chap, the driver of the car that was involved in the accident.

Q. Let me show you Defendant's Exhibit K for identification. So far as the ink handwriting on that is concerned, whose is it?

A. That is my handwriting, sir, my signature.

Q. So far as the ink writing is concerned, if you will look at all six pages, is that all in your handwriting? A. Yes, sir, I wrote that statement.

Q. I call your attention to the fact that each page—I believe I am correct in making this statement—bears the signature as a witness; is that your signature? A. Yes, sir.

Q. Each page also bears a date, I think the date October 21, 1945. Did you put that on there?

A. I did. [181]

Q. When did you put that date on there?

A. At the time that I took this statement.

(Testimony of Bernard George Aguer.)

Q. Was that the date of the statement? Was that the same day that you took the statement that you dated it? A. Yes, sir.

Q. In other words, that is correctly dated?

A. Yes, sir.

Q. About what time did you arrive at the Souza home?

A. I don't recall exactly. It was in the morning, I believe.

Q. When you called there what, if anything, did you say of identifying yourself?

A. Well, I introduced myself and I believe I gave them my card and informed them what purpose I was there for, to investigate the accident and take a statement from Mr. Souza, the driver of the car.

Q. To whom did you identify yourself and make your presence known?

A. Well, Mrs. Souza was there.

Q. Which Mrs. Souza was that?

A. As far as I recall, I do remember distinctly meeting the mother of the driver of the car, Mrs. Souza.

Q. Is that the Mrs. Souza who sits in the middle here?

A. I believe so. I imagine it is. I can't recall her face exactly after this length of time.

Q. At any rate——[182]

Mr. Myers: Just a minute, your Honor. I will ask that the answer be stricken out. He says he imagines. Whatever he imagined we will ask be stricken out.

(Testimony of Bernard George Aguer.)

Mr. Dunne: All right, we will let that go out.

The Court: You can say that you think a thing happened but you can't say you imagine. In other words, you are not required to be more positive than you can, but you can't speculate.

The Witness: Yes. Well, at the time I called at the Souza home, I met a Mrs. Souza who identified herself as being the mother of the boy.

The Court: Q. Do you recognize her as the lady who just testified a while ago?

Mr. Dunne: He was not here when she testified. The witnesses were excluded.

The Court: Oh, I beg your pardon. I forgot.

Q. Do you recognize her in the courtroom, the older of the two ladies sitting there? Stand up, Mrs. Souza, will you, please? Do you recognize her?

A. I am quite sure that is the woman.

The Court: All right, you may be seated.

Q. (By Mr. Dunne): During the course of any conversation who else was there, Mr. Aguer?

A. The son, her boy, who had been driving the car, young Souza, and I believe there was also a sister-in-law. [183]

Q. Were all three of these people present during the course of the conversation?

A. Yes. I am definite with the mother and the son because I spoke to them both. I remember distinctly the mother and the boy, of course, was there, because I took the statement from him.

Q. Did you enter the house? A. I did.

Q. When you entered the house, please tell us in your own way what happened, without now stat-

(Testimony of Bernard George Aguer.)

ing what was said, but tell us how the statement was taken and what was done.

A. Well, as I say, I called and I properly introduced myself as being with the Southern Pacific Railroad Company, and the fact that I was there to investigate the accident and find out what had occurred. I wanted to take a statement—I was interested in taking a statement from the son, the boy who had been driving the car at the time, and I was ushered into the house by Mrs. Souza, and I spent considerable time there.

As I recall, I was asked to be seated and sat down at a table there and I believe it was the dining room of the house. The boy was there and gave me his statement. His mother was right there and, as I recall, there was another woman, a younger girl, who was sitting off in possibly what might be considered the front room of the house there. And we had a very pleasant—as much as possible—a very pleasant meeting there, during which [184] time I took this statement from Mr. Souza. And, as I recall, I believe he was a minor at that time, and for that reason I believe I explained to Mrs. Souza I wanted her to read the statement because I was going to ask her son to sign the statement.

Q. Tell us how you got the statement. The jury would be interested in the mechanics. What did you do?

A. Well, I simply asked the various questions I normally ask relative to the incident and he answered them, and I just put his answers down

(Testimony of Bernard George Aguer.)

and wrote this statement, which is the statement here. That is all there was to it.

Q. Is the paper that you hold in your hand, Defendant's Exhibit K for identification, the paper that you wrote at that time?      A. Definitely.

Q. And at the Souza home?      A. Yes, sir.

The Court: I haven't seen the statement. That is not in question and answer form. It is merely the substance of what he was telling you?

The Witness: Yes, that is true.

The Court: Q. Is it written in the first person? Does it say "I did so-and-so"?

A. Yes, it is.

The Court: Go ahead.

Q. (By Mr. Dunne): So far as that statement is concerned, did [185] you at that time, at least in so far as you had capacity to do it, put down there accurately what you were told?

A. Yes, sir.

Q. Did you get the information that is in there from the young man, John Souza?

A. Yes, sir.

Q. Did you put anything in there yourself? Did you interpolate anything yourself, anything in addition to what you were told by John Souza?

A. No, sir.

Q. After that was written, then, you completed it, what then did you do?

A. Well, as I say, I had Mrs. Souza read the statement, which she did and told me that it was all right and, of course, she had been present when



(Testimony of Bernard George Aguer.)

her son had given me the statement, and I had her son read the statement, but, as I recall—well, it was Mrs. Souza who made an objection there that she didn't care to have her son sign it nor would she sign it because, as she stated there, she didn't feel it was the thing to do from her standpoint. She wished to see an attorney. That was her words—"I intend to see an attorney. Before I sign anything, I wish to see an attorney."

Q. After the son read it over, did he make any comment?

A. I asked him, which is customary, if the statement were true and correct to the best of his knowledge and belief, and he told [186] me, "Well, that's it."

The Court: Q. Did you ask him to sign it?

A. Yes, sir, I did.

Q. What did you say to him?

A. Well, as I recall, I remember distinctly asking Mrs. Souza, in deference to her, because of the fact that the boy, as I say, I believe was a minor at the time, and Mrs. Souza simply stated that she didn't wish to have the boy sign the statement and she wouldn't sign it herself.

Mr. Dunne: If your Honor please, we offer this in evidence with an exception: there is some matter that I called to the attention of counsel upon the other side and it is agreed between us that it has no bearing on this matter. Is that correct?

Mr. Myers: Well, that is right, but, your Honor, we object to the statement itself on the ground



(Testimony of Bernard George Aguer.)

it is incompetent, irrelevant and immaterial. He can state what conversation he had at that time and place and the persons present, but any purported written statement that is not signed and which the plaintiffs have stated they have never even seen before, before coming to court today, it is incompetent, irrelevant and immaterial to put that in evidence. As far as the conversation is concerned, that is a different matter.

The Court: This is more than a memorandum. This is not used merely to refresh his recollection. This is used as primary evidence of what a person told him and what he put down. [187] Now, of course, that person has denied it. It is up to the jury to determine which version of the transaction they will believe, but this statement is admissible under the facts given by the witness.

Mr. Myers: All right.

Mr. Dunne: If your Honor please, that part referred to I have marked in pencil and will omit.

The Court: Do you want to read it?

Mr. Dunne: I do want to read it because of that part that is to be omitted.

The Court: We can cover it up if it is sent out to the jury as an exhibit.

Mr. Dunne: Yes, your Honor.

The Court: I will instruct the Clerk to cover up the portion. We have a way of placing a paper across in a manner that the jurors can't see it without destroying a seal. They usually don't anyway.

(Testimony of Bernard George Aguer.)

Mr. Dunne: And that part of it, if your Honor please, I have enclosed with pencil.

The Court: All right.

Mr. Dunne: Shall I read it now?

The Court: Well, if you have finished with this witness——

Mr. Dunne: I had finished with the witness.

The Court: All right.

Mr. Dunne: This again is on a form partly printed and [188] partly written:

“Statement of John Martin Souza.

“Home address: Rt. 3, Box 633, Toomes Road, Modesto.

“Occupation Dairy Farmer. Employer Self employed.

“Business address: same.

“What day and what hour did accident occur? October 11,—about 9:15 a. m.

“Where did accident occur? At intersection of Beckwith Road and Southern Pacific Railroad Crossing.

“Where were you when accident occurred? (Blank.)

“Do you know anyone who saw accident? Please give names and addresses. No—but we expect to uncover witness.

“Did you witness accident? Involved.

“Give full account of your knowledge of accident.  
“I am the legal and registered owner of the automobile involved in the crossing accident, at Beckwith Road and Southern Pacific right of way,

(Testimony of Bernard George Aguer.)

which occurred about 9:15 in the morning of October the 11th 1945. The automobile was a 1941 Ford Coupe, license number 93H838. On the morning of the accident I left my house on Toomes road to drive to Dry Creek; to look at a dairy ranch. It was about 9:00 o'clock in the morning when we left our house. It was a nice clear dry morning. I was driving the automobile, and my brother Edward was sitting next to me in [189] the middle of the seat, my father Anthony Souza, was sitting on the right side of the seat. When we left the house, I drove south on Toomes to Beckwith Road. When I reached Beckwith Road, I turned to my left and was driving East, on Beckwith Road. I had the window on my side rolled all the way down, and my father had his window on the right side of the automobile rolled halfway down. I had a radio in the automobile, but it was turned off, and not playing. I was driving along Beckwith Road about 40 miles an hour, and my father and Edward and I were talking about various things. As I drove East on Beckwith Road, I approached the Southern Pacific Railroad tracks crossing Beckwith Road, just before you reach the highway. When I was about 100 to 150 yards away from the crossing I looked for a train. I was slowing up and driving about 30 miles an hour at that time. When I looked for a train, I looked through the windshied. I never seen any train. I did not notice my father or brother looking for a train at that time. They were not saying anything, just riding along quietly. At that

(Testimony of Bernard George Aguer.)

point in the road as I looked, there was a walnut grove on my left, and on my right, running along the road was a fence, covered with grapes. I could see over this grape vine covered fence, but I did not see any train. We were still moving down Beckwith, towards the crossing, and I am slowing up all the time. When I get [190] about 40 yards from the crossing, I look again through the windshield, to my right and to my left. I usually look carefully to the left a couple of times, because of the walnut grove there, at this point I was doing about an estimated 20 miles an hour. The fact that my brother and father were in the seat with me did not bother my vision, the seat was adjustable, and I had it moved back. I could see alright. I did not see anything. I did not hear any train whistle or bell, or hear any train; at this time I still had the fence on my right, but could see over the fence O. K. I kept driving towards the crossing, there was no other automobile, ahead of me, and there was no automobile coming towards me, the road was all clear. I was not talking to my father or my brother, and they were not talking. When I got about 10 feet from the crossing I was slowed up to about 8 miles an hour. I still had not heard any bell or whistle, or seen any train. My father and my brother did not say anything to me, they never did say anything if either one of them ever did see the train they never did say anything about it. Neither one of them ever said a word, nothing! Not even "Look out," even when we were hit! About

(Testimony of Bernard George Aguer.)

this time I was just going onto the tracks, and was doing about 5 miles an hour, I was shifting from high to second gear, and looking straight ahead. I still had not seen any train, or heard any whistle or bell. It was quiet, along [191] through there, no excessive noise, from any tractor or truck, or pump in the fields, just a quiet morning. When I was right on the tracks something caused me to look up to my right, I do not know what, maybe the noise, or something anyway I looked up, and saw the engine, a couple of feet away, and before I had a chance to do anything the engine hit me. That's the last I remember, I was knocked out. I do not know how fast the engine was going when it hit me. My father and brother never said a word to me. I never, at no time, heard the train whistle or bell and I never did see the train (engine), till it hit me (just a second before it hit me.) The engine hit me on my right side, just where I do not know, I have not seen my automobile yet. The accident happened because I did not see the engine, and did not hear any whistle, or bell. The engine was hard to see because it was traveling alone (pulling no cars); if it was pulling cars, I could have seen it. I think when I looked that the engine was probably in that blind spot on the right corner of my windshield, where the door joins the windshied there on the corner of the automobile that partition there on the corner. I do not think that the man on the engine blew the whistle. I never did hear any whistle. I bought my automobile in March, and had



(Testimony of Bernard George Aguer.)

been waiting for my father and mother to go into town with me for my driver's license. I do not have a driver's [192] license. I had taken out a driver's permit, but I lost it.

"Have you read this statement on 6 pages and is it true and correct, to the best of your knowledge and belief? (Blank.)

"I witnessed my Son, John Martin Souza, read this statement of his, and he states that it is true and correct, to the best of his knowledge and belief. I also read the statement. (Blank.)

"Dated Oct. 21, 1945.

"Witness: B. G. Aguer.

"Signed: (No signature)."

Mr. Dunne: I have no further questions.

The Court: All right, cross-examine.

#### Cross-Examination

Q. (By Mr. Myers): This is entirely in your own language, is it not, Mr. Aguer?

A. No, I wouldn't say that. I always put down in the statement as much as possible in the person's language, just as the person tells it to me.

Q. Whose language is that?—"I witnessed my son, John Martin Souza, read this statement of his and he states that it is true and correct to the best of his knowledge and belief. I also read the statement." Whose language is that?

A. Well, I wrote that down. [193]

Q. It is your language, isn't it?

A. Mrs. Souza witnessed the boy giving the statement.



(Testimony of Bernard George Aguer.)

Q. Just answer the question, please. Isn't that your language.

A. Well, I wrote that statement down.

Q. Yes, it is your language. It is not something someone told you?

A. No, that is true, I wrote that down.

The Court: Q. In other words, the portion counsel has just read is the attestation clause which you usually put in and you wrote that down; nobody spoke those words?

A. That is true, but before I put that down, sir, I asked Mrs. Souza the question, Mrs. Souza gave me the answer, and then I put that statement down.

Q. She said, "I witnessed my son, John Martin Souza, read this statement"?

A. She witnessed her son give that statement and was true and correct to the best of her knowledge and belief.

Q. Is it your testimony that that statement at the bottom of the larger statement was not written at the same time as the other pages in that statement?

A. That was put down directly at the conclusion of the statement there. When I took the statement I put that down.

Q. In other words, according to you, when you got through writing you came down to the last page and left a blank, and then you wrote this in, filled this in, and then you were [194] going to have those people sign that statement, is that it?

A. After they read it. I put that statement in

(Testimony of Bernard George Aguer.)

after they read the original statement of the boys.

Q. It is your testimony, then, that both John Martin Souza read this statement and Mrs. Josephine Souza read this statement before you ever wrote in this paragraph that I just read to you?

A. Not the last one, no. I wrote the statement out the boy gave me and then I put down in conclusion, "Have you read and do you understand," for the boy to sign, and that is when the mother objected. And, of course, the mother had read the statement also. So then I put in for Mrs. Souza, there, and then, of course, she wouldn't sign either.

The Court: Q. She didn't say "I witnessed"? You asked her a question and she answered it, and then you put that down in your own words?

A. That is right, that is right.

Q. In other words, when you refer to putting down the statement as nearly as possible, you refer to the main statement about the accident, not that. That is so obviously in terminology she is not likely to use.

A. That is right.

Q. (By Mr. Myers): Isn't it a fact that this entire statement was written by you, Mr. Aguer, after you had left the home of Mrs. Souza on whatever day it was that you were out there?

A. That statement was written in the home of the Souzas in [195] the presence of Mrs. Souza and her son.

Q. It is your testimony that they saw you——

The Court: He has answered that. You have asked him that two or three times.

(Testimony of Bernard George Aguer.)

Q. (By Mr. Myers): —saw you write this statement, is that it? A. Absolutely.

Q. When you went to the home of Mrs. Souza, did you go there for the purpose of obtaining a statement? A. Yes, sir.

Q. When you got to her home did you tell Mrs. Souza that you came there to get a statement from her son, John Martin Souza? A. Yes, sir.

Q. Did you also tell them that there was no obligation on their part to give you a statement?

A. No, sir, I don't believe I did.

Q. Did you hold out any promises to them, at all, to get them to give you a statement?

A. No, no promises. I made no promises.

Q. Of their own free will and accord, then, John Martin Souza, it is your testimony, related all this to you? A. Absolutely, yes, sir.

Q. And then after you had gone to the trouble of writing it all down, then these people refused to sign it, is that your testimony? [196]

A. Mrs. Souza did, yes.

Q. How about John? Did he refuse to sign?

A. Well, he acquiesced to his mother's wishes. In other words, after his mother said she didn't want to sign it, he simply wouldn't sign, and she wouldn't sign, either.

Q. What did you tell them when you left their home that day? That you would be back?

A. I don't believe I told them that, no.

Q. Didn't you tell them that you would be back in about a week or two when they were feeling better?

(Testimony of Bernard George Aguer.)

A. No, I don't recall telling them that, at all. There would be no need for me to.

Q. What is your memory? After you had finished writing up this statement, according to your testimony, then, after you had finished writing up the statement what did you tell them when they refused to sign it?

A. I don't recall telling them anything. It was their privilege. I mean to say if they didn't want to sign it I couldn't force them to sign it, and so I just paid my respects and left, as I recall.

Q. And you did not say anything about being back again?

A. No, I don't recall saying that, because there would be no need for me to come back.

Q. You didn't say you would come back later with a statement for them to sign? [197]

A. No, I didn't. I didn't.

Q. Are you sure you didn't tell them that?

A. I don't recall telling them that.

Mr. Myers: That is all.

Mr. Dunne: That is all.

The Court: Have you another witness?

Mr. Dunne: He may be fairly long, your Honor.

The Court: Who is he?

Mr. Dunne: He is the other man who was in the cab of the locomotive.

The Court: We will make up for it if necessary tomorrow at the noon hour, but we had better not start a long witness at this time. You will remember you asked for the privilege of passing those

photographs. If you want to do that for the next minute or so, you may pass those photographs.

Mr. Myers: Just the one.

The Court: Pass the photographs to the jury.

Mr. Myers: May I pass this exhibit to the jury, your Honor?

The Court: Yes; go ahead.

Mr. Dunne: If your Honor please, at the same time I put in some photographs that——

The Court: That's all right. We will take a little time and have the jurors examine the photographs.

Mr. Dunne: They might as well look at all of them at one time.

The Court: I will tell you what to do. Start the group in the back and let them meet backwards, you see; start that way and start one in the back. Now, just swear the witness and then I can tell him to come back in the morning, to come right in the courtroom in the morning.

(Witness Brown for the defense was then sworn by the clerk.)

The Court: Have you any other witnesses who will testify to the incident of the accident or is he the only one?

Mr. Dunne: No, we have some others, your Honor.

The Court: Well, after he has testified I will relax that rule, because after there has been a conflict established before the jury and the jury have heard the two stories, there is no reason for maintaining the rule and we can speed up examination of witnesses. You don't want this man now?



Mr. Dunne: Well, this is Mr. Brown. He will also be a witness. [199]

The Court: He is not the first witness?

Mr. Dunne: No, he is not the first witness.

The Court: You go back. We will swear the other man so he can come right in in the morning.

FRANK MELLOLO,

called as a witness on behalf of the defendant; sworn

The Clerk: Will you state your name?

A. Frank Mellolo.

The Court: I just wanted to swear you in tonight but you won't be examined tonight. You come back tomorrow morning and come right into the courtroom and you will be the first witness to be examined in the morning. You may be excused until tomorrow morning.

Mr. Dunne: At ten o'clock.

The Court: Come directly in here without waiting to be called.

The Witness: Ten o'clock; all right.

(The jurors then viewed the photographic exhibits.)

The Court: The jurors have examined the exhibits and they will be returned to the clerk.

Ladies and gentlemen, we are about to take an adjournment until tomorrow morning at ten o'clock. The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial of this cause, or form [200] or



express an opinion thereon until the cause is finally submitted to you.

You have seen today the problem which will confront you. You have had testimony as to incidents which one witness says took place and another witness says did not take place. You will have to resolve the conflict. To do that and to decide all of the matters you will need the instructions of the court as a guide in determining the credibility, so I give you again the injunction, keep your minds open until all the evidence is in and the case submitted to you after the arguments of counsel and the instructions on the law by this court.

(The trial was then adjourned until tomorrow, Thursday, July 22, 1948, at 10:00 o'clock a. m.) [201]

Thursday Morning Session, July 22, 1948,  
10:00 o'clock

The Clerk: Case of John Martin Souza against the Southern Pacific Company; on trial.

The Court: Proceed. Let the record show the jury is in the box.

FRANK MELLOLO

called by the defendant, previously sworn.

The Clerk: Will you state your name?

A. Frank Mellolo.

Direct Examination

Q. (By Mr. Dunne): Mr. Mellolo, will you please state your name again?

A. Frank Mellolo.

Q. What is your business?

(Testimony of Frank Mellolo.)

A. Railroad trainman and conductor; brakeman and conductor.

Q. You are a promoted man? A. Yes.

Q. Working for what railroad?

A. Southern Pacific.

Q. How long have you worked for the Southern Pacific? A. Twelve years.

Q. How long as a brakeman?

A. Four years. [202]

Q. Then you were promoted?

A. Two years as brakeman, two years as conductor.

Q. That takes up four years. What was the other of the twelve years? A. Yardman.

Q. That is the same general character of work except confined to the yard? A. Yes.

Q. Were you working for the Southern Pacific Company in October, 1945? A. Yes.

Q. On what division were you working?

A. Western Division, Stockton District.

Q. Tell us where the Stockton District of the Western Division is.

A. It runs from Tracy to Roseville and Roseville to Fresno and Fresno to Tracy.

Q. In October of 1945, where was your home; where were you living?

A. Stockton, California.

Q. In October 1945, the date is the 11th of October, were you on a locomotive that was involved in a crossing accident and an automobile a short distance railroad west of Modesto at a crossing

(Testimony of Frank Mellolo.)

known as Beckwith Road?           A. Yes. [203]

Q. Do you recall the name of the engineer on that locomotive?           A. Mr. Glanville.

Q. Did you know him before this time?

A. Yes.

Q. Do you recall who the fireman on that locomotive was?           A. No.

Q. Can you tell us about the number or the type of the locomotive?

A. It was a 2400; 2487.

Q. Where had you come from on that morning?

A. From Fresno.

Q. At the time of the accident was that locomotive drawing any cars or was it operating light?

A. Light engine displaying markers.

Q. So the record will be clear, you and I understand what that means—what does it mean?

A. Light engine displaying markers is a train.

Q. Does it have cars?           A. No cars.

Q. But it is known on the railroad as a train?

A. Yes.

Q. Will you please tell the ladies and gentlemen how you happened to be riding a light engine?

A. I was ordered that morning to deadhead to my home terminal the most convenient way I could get there and as I left the [204] crew dispatcher's office, I met Mr. Glanville who was going to Sacramento and he said it would be all right to ride with him as far as Manteca and I could get a bus from Manteca to my home terminal which is Tracy, which I did.

(Testimony of Frank Mellolo.)

Q. Explain that so the jury will understand. Going from Modesto northward to Tracy, is there a line of railroad that goes into Tracy?

A. Is there a line?

Q. Yes. A. Yes, there is.

Q. Going northward from Modesto, or railroad west from Modesto, is there a line of railroad that goes into Sacramento without going through Tracy?

A. Yes.

Q. Where does that turn off? A. Lathrop.

Q. Where is Manteca with respect to Lathrop?

A. Well, it is about four miles, three or four miles from Manteca.

Q. What, Lathrop? A. Yes.

Q. Which direction from Lathrop is Manteca?

A. Lathrop is west of Manteca.

Q. So that Manteca then is on the line of railroad between Modesto and Lathrop? [205]

A. Yes.

The Court: A different county. Manteca is in San Joaquin County.

Mr. Dunne: That's right. I was speaking of the town of Modesto.

Q. Was that trip a revenue trip? A. Yes.

Q. Were you paid for it?

A. Yes, I was paid for it.

Q. Can you tell us about what time the locomotive left Fresno?

A. It was in the early morning; I don't know the exact time.

Q. On that trip where did you ride in the locomotive?

(Testimony of Frank Mellolo.)

A. I rode in the gangway of the engine.

Q. On which side, Mr. Mellolo?

A. On the right side.

Q. Is that the engineer's side or the fireman's side?

A. That is the engineer's side.

Q. I want to show you Defendant's Exhibit R here, this is a photograph taken of the side of 2487 and somewhat from the front and ask you if you recognize that as a photograph of the locomotive.

A. Yes.

Q. I think if you would hold it that way so the jurors can see it. I will ask you to point out to them where the gangway is.

A. The gangway is the ladder that you step down from the [206] engineer's platform to the ground; there is a platform from the watertank, that divides the water tank and the boiler. The boiler is the big part of the engine, the front part, and there are two grabirons that are in between this platform and I was standing right at the gangway here facing the cab.

Q. Where was the engineer?

A. He was sitting on the seat box.

Q. Where would that be in relation to where you were standing?

A. He would be in front of me. I was standing behind him.

Q. There is a window that shows there on the side of the cab and out of it there is a little tiny object. Do you know what that is?

A. That is a steel—that is his armrest.

Q. Is that where he was, at the window?



(Testimony of Frank Mellolo.)

A. Yes.

Q. Behind the engineer, was there anything between you and him? A. Yes.

Q. What? A. Steel plate.

Q. How wide is that plate?

A. Approximately about, I would say about half inch.

Q. I mean this way (indicating).

A. Oh, it is about three feet, approximately three feet.

Q. Do you recall whether or not from Fresno up to the point of the accident the locomotive made any stops? [207]

A. Yes. It made, I believe, two stops.

Q. On those stops did you perform any function in connection with the operation of the locomotive?

A. I lined the switches into the siding and out of the siding and behind the engineer entering and leaving the siding.

Q. On that particular piece of track, Mr. Mellolo, between Fresno and Manteca, have you worked over that? A. Yes.

Q. For how many years have you worked over that? A. Four year.

Q. Do you know where Modesto is located?

A. Yes.

Q. After you went to Fresno and went to Modesto and then you were on the locomotive at the time of the accident, were you? A. Yes.

Q. Then you continued on the locomotive for how far? A. To Manteca.

(Testimony of Frank Mellolo.)

Q. Did you get off at Manteca?

A. Yes, sir.

Q. Where in Manteca did you get off?

A. Near the SP depot.

Q. Is Manteca just a siding, a name, or is there a town there?      A. There is a town there.

Q. I want to call your attention and get some information from you with respect to what happened after you left Modesto and I [208] wish you would tell the jury particularly now from Modesto up to the point of the accident where you were riding in the locomotive.

A. I was sitting in the gangway of the locomotive facing the highway. The gangway was on the right side of the engine, the engineer's side, watching the automobiles go by on the highway.

Q. Were you doing anything else?

A. No.

Q. Were you talking to the engineer?

A. No; I could not.

Q. Did you talk to the fireman at any time from the time you left Modesto up to the time of the accident?

A. Only when we picked up train orders, to read the train orders.

Q. That was the only conversation you had?

A. That was the only conversation.

Q. Is that for the whole trip?

A. The whole trip.

Q. I wish you would tell the jury your recollection of the operation of the locomotive from Mo-

(Testimony of Frank Mellolo.)

desto up to the point of the accident with respect to its speed, whether its speed was the same, whether it varied, how it varied and what it did. I want you to give the information to the jury, as exact information as you can as to the speed and operation of the locomotive from Modesto to the point of the accident. [209]

A. Well, he was traveling approximately 40 miles an hour.

Q. At what time? A. At what time?

Q. Yes. Was he going 40—did he go through Modesto at 40?

A. No. He reduced speed for Modesto.

Q. Where in Modesto did he reduce speed?

A. When he hit, just approaching the Tidewater Southern Railway crossing.

Q. Is that a railroad crossing there?

A. It is; east of Modesto.

Q. That is the crossing of another railroad?

A. Yes.

Q. What is your best estimate as to the speed to which he reduced? A. 25 miles an hour.

The Court: That is not a steam railroad. That is an interurban, Tidewater Southern. That is an interurban or electric railroad, isn't it?

A. That is a steam.

The Court: A steam railroad. A. Yes.

Q. (By Mr. Dunne): Where in Modesto is that crossing, is it railroad east end of Modesto or railroad west end, or is in the center of town?

A. It is the east end of Modesto, just entering Modesto yard. [210]

(Testimony of Frank Mellolo.)

Q. After you crossed the Tidewater Southern, what was the operation of the locomotive as to speed?

A. He reduced speed to 20 miles per hour through Modesto.

Q. Then what happened?

A. Then when he was out of the yard at Modesto, which is approximately a mile, a mile and a half from the Modesto depot, he then increased to 40 miles an hour.

Q. Just immediately before the accident, what was the speed of the locomotive?

A. Just before the accident?

Q. Yes.

A. Well, it was in an emergency just before the accident and I don't know what the exact speed was when we hit the automobile.

Q. What was its speed when it went into emergency?      A. 40 miles an hour.

Q. Did you at any time see the automobile which was involved in the accident before it was struck by the locomotive?      A. No.

Q. When did you first see it?

A. As it went by the right side of the engine, it was in motion, a spinning motion.

Q. As you were running along there, what was the first thing that attracted your attention? You said that the locomotive went into emergency. Was there anything specially that attracted [211] your attention before then?

A. Yes. I noticed the way he was blowing his

(Testimony of Frank Mellolo.)

whistle; it was sudden and some different than a regular crossing whistle. Regular crossing whistle he just has two longs, short and long. Well, this one—to one who work on railroads, it was known to railroad men and engineers as disaster. You could tell by the way he is blowing his whistle.

Q. Before that had he blown a crossing whistle for this crossing, before the accident happened?

A. Had he blown it before?

Q. Yes.           A. Yes.

Q. Then after that was this unusual whistling?

A. Yes.

Q. Then what happened?

A. Well, I sensed something was wrong and the automobile was in a spin and I could see the damaged automobile.

Q. You said the locomotive went into emergency?           A. Yes.

Q. Will you tell the jury what that is?

A. Well, they have an emergency brake and it sets the brakes up immediately and when he puts it into emergency you can hear the air escaping, which escapes very suddenly.

Q. Who operates that?           A. The engineer.

Q. What does he operate to put in into emergency?           A. A lever.

Q. Where is that located in the cab?

A. It is right in front of him.

Q. You say the locomotive went into emergency. I would like you to tell the jury what attracted your attention, was it the brakes taking hold or was it the blowing of the air?



(Testimony of Frank Mellolo.)

A. It was both, the blowing air and the brakes taking hold.

Q. Up to that time had you heard the engineer say anything?      A. No.

Q. Had you heard the fireman say anything?

A. No.

Q. Tell me, Mr. Mellolo, as you left Modesto and went up to the point of this accident, I would like you to tell the jury what the character of the weather was.      A. It was clear, daylight.

Q. Do you remember about what time it was?

A. Not the exact time but it was in the morning.

Q. Was there any fog?      A. No.

Q. Any rain?      A. No.

Q. Any haze?      A. No, sir.

Q. Can you tell us whether or not as the locomotive approached [213] this crossing where the accident happened, whether the engine bell was ringing?

A. No, I can't state because there are times you can hear the bell ringing and there are times you can't hear it ringing on an engine. When you go by buildings and signboards you can hear it ring; the echo, I believe. There are times you can't hear the bell ringing in the cab of the engine traveling at that speed.

Q. With the locomotive traveling light that way, is the locomotive itself, aside from any bell or whistle, making any noise?      A. Yes.

Q. You have been in a cab and all this is clear to you, but I wish you would tell the ladies and

(Testimony of Frank Mellolo.)

gentlemen who probably have not been in a cab what the noise in the cab is.

A. Well, it is a pounding noise, a rattling noise. It is almost impossible to talk in the cab of an engine traveling 35 to 40 miles an hour from the rattling and pounding of the engine. You have to scream in order to talk.

Q. You have told us you saw this car spinning. Which side of the engine was that one; was that on the fireman's side or the engineer's side?

A. The engineer's side.

Q. Was that the side where you have been standing?      A. Yes. [214]

Q. Can you give us any idea after the car was spinning and after the emergency brakes were set how far that locomotive ran beyond the crossing before it stopped?

A. That I don't remember. It happened so long ago. Really, I don't remember the exact distance that it was.

Q. Did the locomotive come to a stop?

A. Yes.

Q. After the locomotive came to a stop what then was done?

A. We backed up to the scene of the accident.

Q. And was assistance given to those that had been injured?      A. Yes.

Q. About how long was the locomotive there at the scene of the accident?

A. Well, it was there until the ambulance arrived and the Highway Patrol arrived and the

(Testimony of Frank Mellolo.)

Highway Patrolman said that he would take charge and I don't know the exact time that we stood there but he had everything in control. He said he would take care of everything and we left for our destination.

Q. All right. After you left was there any other stop made by the locomotive between the scene of the accident and Manteca?

A. Yes sir; there was one stop made.

Q. Will you please tell the jury about that stop?

A. The engineer started—he left the scene of the accident and the locomotive was traveling at about 40 miles per hour and he [215] put it into emergency to see what distance that it would take to stop the engine traveling at 40 miles per hour.

Q. How did that distance compare with the stop at the scene of the accident.

Mr. Myers: Just a minute. I object to that as incompetent, irrelevant and immaterial. The witness stated he does not know how far the engine traveled after the accident.

Mr. Dunne: He may not know in feet, but he can certainly have made both——

The Court: Unless it is expressed in true distance, I mean comparative speed—I will sustain the objection.

Mr. Dunne:—I have no further questions. [216]

#### Cross-Examination

Q. (By Mr. Myers): Mr. Mellolo, do you still live in Tracy?      A. Yes, sir.

Q. Have you lived there ever since this accident happened?      A. Yes, sir.

(Testimony of Frank Mellolo.)

Q. Do you still work on the same division?

A. Yes, sir.

Q. After this accident happened did you discuss the case with anyone? A. Yes, sir.

Q. With whom did you discuss it?

A. The first time was at Roseville. A man came up to get a written statement of the accident.

Q. At Roseville? A. At Roseville.

Q. When was that?

A. It was sometime in May, I believe.

Q. Of what year? A. Of this year.

Q. May of this year, so that this accident happened October 11, 1945, and the entire period from the time of the happening of the accident until May of this year went by without you discussing the case with anyone, until this man came to get the statement, is that correct? A. Yes, sir.

Q. Are you familiar with the rule of the company that requires employees to file reports immediately after the happening of an accident?

A. I was merely deadheading.

Q. Pardon me, sir? Are you familiar with that rule? A. Yes, sir.

Q. And you did not file a report then?

A. No, sir.

The Court: You started to give your reason when counsel interrupted.

Q. Why didn't you file it?

A. I was merely deadheading and I was not responsible for the locomotive.

Q. Go ahead and finish.

(Testimony of Frank Mellolo.)

A. I was not responsible for any part of that locomotive, and so I didn't have to make out a statement.

The Court: All right.

Q. (By Mr. Myers): So long as you felt that you did not have to make——

The Court: He didn't say he felt; he is stating a fact. Please do not add words to his answer.

Mr. Myers: I am sorry, your Honor.

The Court: He did not say he felt; he said he wasn't responsible for it.

Q. (By Mr. Myers): Is it your testimony that you were not [218] required to make out a report?

A. That is the way I see it. I didn't have to make out an accident report.

Q. That is a company rule, that you do not have to make out a report unless you are in charge of equipment, is that right?

A. Well, the way I interpret the rule——

Q. Pardon me, sir.

The Court: He doesn't have to answer "Yes" or "No." You know that.

Mr. Myers: I thought maybe——

The Court: No, he is not required. You are cross-examining him. He is not required to answer "Yes" or "No." Complete your answer, please.

The Witness: Deadheading you are not on duty. If you are on duty deadheading it interferes with your Hours of Service Act, and if I was to make a report I would have to show time, and that would come on my Hours of Service Act, and I would be violating the State law.



(Testimony of Frank Mellolo.)

The Court: Q. In other words, as you understood your position, you were not taking any active part in any operation; you were just getting a ride, isn't that true? A. Yes, sir.

Q. To your next station, and for that reason you did not make any report?

A. That is right. [219]

Q. (By Mr. Myers): Is it your testimony that this was not a paid trip?

A. We get paid for deadheading.

Q. You get paid for deadheading, so that in getting paid for deadheading, then under the company rules you were required to make a report, were you not?

Mr. Dunne: That is objected to.

The Court: I will sustain the objection. It is not material whether he made a report, or not. The only object of the inquiry is to show whether he remembered. He has already given his reason why. He is not charged with any dereliction of duty in failing to make a report. He has merely explained why he was not approached and did not make a report. He has given an answer, and you stop right there; otherwise I am going to instruct the jury that all this inquiry does not reflect upon the credibility of his testimony.

Mr. Myers: Very well, your Honor.

The Court: All right.

Q. (By Mr. Myers): Was it after May 21, 1948 that you made this report to the company?

A. I don't remember the exact date.

(Testimony of Frank Mellolo.)

Mr. Myers: May I ask counsel if he has that report?

Mr. Dunne: It is not a report. It was a statement. It is not a 2611. I am handing the original of the statement to [220] counsel.

Mr. Myers: I merely wanted to get the date, your Honor, off the statement.

The Court: All right.

Mr. Myers: With your Honor's permission I should like to ask one more question on the matter of making a report, and I hope I am in order.

The Court: Ask the question and I will tell you.

Q. (By Mr. Myers): Mr. Mellolo, isn't the fact that the reason you filed no report as to the happening of this accident was that you, yourself, were violating the rule of the company in riding in the cab of the engine and therefore did not file a report as to the happening of the accident?

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial.

The Court: I am going to allow him to answer, but I will instruct the jury in advance that whatever the answer is, the fact that he may be violating a rule of the company in traveling along does not affect his credibility. That is not the way to impeach a witness, you see. I am allowing the question because it is merely an explanation as to why he did not file a report and was not asked before this date to give a report. You may answer the question.

A. No, sir, I was not.

Q. (By Mr. Myers): It is your testimony that

(Testimony of Frank Mellolo.)

you were riding [221] in the gangway of this locomotive, on the engineer's side, which would be the Highway 99 side of the engine, is that correct?

A. Yes, sir.

Q. How far had you ridden in the gangway of the engine? A. From Fresno.

Q. You had stayed in that particular place all the way from Fresno up to the time the accident happened? A. In the gangway.

Q. I believe you stated on direct examination that you may have had to align some switches at one time or another. A. Yes, sir.

Q. With the exception of that you stayed in the gangway of the engine all the time?

A. No, sir, I read train orders, picked up train orders and handed them from one employee to the other.

Q. In any event, in the gangway of the engine as you rode along there, you heard the engine from time to time whistle for railroad crossings, did you?

A. Yes, sir.

Q. Having in mind that this accident happened in October of 1945, can you state definitely that when you gave this statement to the claims man in Roseville this year that you have a distinct recollection that a whistle was sounded at this one particular crossing? [222]

A. Will you repeat that?

Mr. Myers: May the question be read?

The Court: Read the question, Mr. Sweeney.

A. Yes, I can state that.

(Testimony of Frank Mellolo.)

Q. (By Mr. Myers): You are sure that you remember a whistle being sounded, is that right?

A. Yes, sir.

Q. Was there a whistle sounded at North Road, which was approximately 3600 feet railroad east, or, from the standpoint of our directions, south of this particular crossing where the accident happened?

A. Yes, whistles were blown at all railroad crossings.

Q. Pardon me. Was a whistle sounded at that crossing?

A. Yes, sir.

Q. You distinctly remember that?

A. It was at all railroad crossings.

Q. You distinctly remember a whistle being sounded at North Avenue, do you?

A. Yes, sir.

Q. Was that the usual whistle, or was that a series of short blasts?

A. That was the usual whistle.

Q. The usual whistle?

A. Yes, sir.

Q. Where was it sounded with reference to that crossing? [223]

A. At the crossing whistle post, from the crossing whistle post to the crossing.

Q. How far south of that crossing or railroad east?

A. East?

Q. Of the crossing, yes.

A. Well, it is between the crossing whistle post and the crossing. I don't know the exact footage on the distance.

Q. You do not recall how far it was from that

(Testimony of Frank Mellolo.)

crossing the whistle was sounded, is that right?

A. No, sir.

Q. How far railroad east of that crossing was the whistle last sounded?

A. What crossing are you speaking of now?

Q. I am speaking of the next crossing south of that.

A. Between the crossing post and the crossing.

Q. How far was that crossing south of North Avenue?

A. How far is the crossing?

Q. Yes.

A. I don't know the distance of them crossings.

Q. How many whistles were sounded? How many crossings were whistled for after your engine left Modesto until this accident happened?

A. How many?

Q. Yes.

A. I don't count the crossings as I travel from station to station. [225]

Q. Was a whistle sounded more than twice after you left Modesto on this particular day?

A. What point of Modesto?

Q. The town of Modesto.

A. Yes, whistled twice.

Q. What is that? A. Yes, sir.

Q. How many times was it sounded?

A. I don't count them. I don't know.

Q. The fact of the matter is you have no memory of that, is that right?

A. I don't count crossings from town to town.



(Testimony of Frank Mellolo.)

Q. As a matter of fact, Mr. Mellolo, you do not have any independent memory of a whistle being sounded at Beckwith Road, do you?

A. I do, sir.

Q. Then your memory in that regard immediately at the time the engine went into emergency and you saw particles of the automobile flying, there was a series of short blasts, isn't that true?

A. The whistle was blowing, and if you ever ride an engine and it is your first time that you have ever seen anybody hit by a locomotive, you will never forget seeing it, and you will never forget that whistle. That was my first experience on a locomotive hitting an automobile. [225]

Q. Just come back to my question. The whistle that you are talking about, however, was a series of short blasts that took place immediately at the time this car was struck, isn't that true?

A. He blew the crossing whistle between the crossing sign post and the crossing, and then after that there was a consecutive short blast.

Q. How far from the crossing did he blow the whistle, from Beckwith Road?

A. I don't know the distance between the crossing post and the crossing.

Q. Haven't you any idea how long it was before reaching Beckwith Road the whistle was sounded, if it was sounded?

A. Before reaching the crossing?

Q. That is right.

A. I don't know the exact footage on that.

Q. Put it this way: How much time elapsed

(Testimony of Frank Mellolo.)

from the time that whistle was blown until you saw the particles of the automobile fly and felt the engine go into emergency? From the standpoint of your time, how much time elapsed?

A. I don't know the exact time.

Q. What is your best estimate?

A. Well, he blew two long, a short, and a long, and after that there were several shorts, and he was still blowing—after the accident happened it was still blowing, the engine. I [226] guess he was excited and nervous, and so I don't know the time between the whistles.

Q. You have no idea, then, in the lapse of time, how much time elapsed from the time he first sounded that whistle until the accident happened?

A. That is right.

Q. You travel on time, do you not?

A. Yes, we travel on time.

Q. What is that? A. Yes, sir.

Q. A railroad man's watch is the most important part of his equipment, isn't it? A. Yes, sir.

Q. Is it your testimony that you do not have any idea at all the time that elapsed between the time of the sound of the whistle and the time the accident happened?

A. On railroad time we do not guess at time. We have to use accurate time.

Q. All right. Do you have any estimate on it?

A. No, I do not.

Q. Might it have been a minute?

A. I wouldn't make no statement.

(Testimony of Frank Mellolo.)

Q. What is that?

A. I wouldn't state no time on it.

Q. Could it have been thirty seconds? [227]

A. It possibly could.

Q. Do you think that 30 seconds would be a fair estimate of the time?

A. Well, I believe that 30 seconds would be a little long.

Q. Would you say 20 seconds?

A. About that.

Q. 20 seconds would be your best judgment?

A. It would be.

Q. Did you get out of the engine after the accident happened?      A. Yes, sir.

Q. What did you do?

A. I just watched what went on.

Q. When the engine moved out again were you let out somewhere?      A. Was I let out?

Q. Let out of the engine.

A. Yes, at Manteca.

Q. At some crossroad?

A. At the depot at Manteca.

Q. The engine slowed down and you stepped off?

A. It stopped.

Q. What is that?

A. It came to nearly a stop. It didn't have to come to a dead stop.

Q. It slowed up slow enough for you to get off and then it went on its way, is that right? [228]

A. That is right.

Q. You think that it was between the point of where this accident happened and the point where

(Testimony of Frank Mellolo.)

you got off that the engineer made another emergency stop? Do you remember that, do you?

A. From the point of the accident to where?

Q. To where you got off.

A. Did he make an emergency stop?

Q. Yes.           A. Yes, he did.

Q. Whereabouts was that?

A. It was leaving Modesto, the scene of the accident, that crossing where the accident happened, leaving there, between there and Manteca.

Q. After you talked to this claims man who took the statement from you in Roseville, this year, whom else did you talk to after that time, if anyone?           A. Mr. Dunne, the attorney.

Q. Did you talk to anyone else?

A. No, sir.

Q. Did you discuss the facts of the case with both of those gentlemen?

A. I gave them a statement on what I knew of it.

Q. I noticed on direct examination, in answer to Mr. Dunne's questions, Mr. Mellelo, you stated that it was a clear day, it was not raining and there was no fog, is that right? [229]

A. Yes, sir.

Q. And I thought that you hesitated a bit on the haze. Now, what is your memory about the haze on this particular morning?

A. It wasn't hazy. I stated it was clear.

Q. Was there any low-lying ground haze?

A. No, sir.

Q. You are familiar with this particular re-

(Testimony of Frank Mellolo.)

gion, are you not?           A. Am I? Yes, sir.

Q. Do you oft times in October encounter a low-hanging ground haze?

A. Yes, we have clear days, too, in the fall.

Mr. Myers: I think that is all.

Mr. Dunne: That is all, Mr. Mellelo. Call Mr. Talt.

The Court: I think, gentlemen, from now on I am going to lift the rule and you may bring all the witnesses in at the present time.

Mr. Myers: Well, your Honor, I do not want to be in the position of arguing about something all the time, but the way I feel about it is this: I asked for the rule and kept my own witnesses out so they could not hear one another's testimony, and I do not feel it is fair to the plaintiff to have the rest of these witnesses in so they can hear one another testify.

The Court: Is there any other witness to the accident?

Mr. Dunne: Oh, yes, there are other witnesses to the accident, your Honor. [230]

The Court: I thought there were no other witnesses.

Mr. Dunne: Oh, no, we shall have some other witnesses.

The Court: I will let the rule stand, but I will tell you this is the last time I will allow it in any case I try here. I do not allow it in Los Angeles, at all. I do not believe in the rule. However, since I granted it I will let it go.



D. H. TALT,

called as a witness on behalf of the defendant;  
sworn

Q. (By the Clerk): Will you state your name to the jury?

A. My name is D. H. Talt.

Direct Examination

Q. (By Mr. Dunne): Mr. Talt, what is your business?      A. I am a civil engineer.

Q. For whom do you work?

A. Southern Pacific Company.

Q. In what capacity?

A. I am in charge of the surveying and mapping on the Stockton District, which extends down the west side and east side from Lathrop to Fresno.

Q. And do you have a title with the Southern Pacific Company?

A. My title is assistant engineer.

Q. How long have you been assistant engineer doing that particular work on that part of the Stockton Division?

A. On that part of the division 5 years. [231]

Q. On what part of the division is the part of the track, the main track between Modesto and Manteca?      A. On what part of it?

Q. Yes.      A. It is on the east side.

Q. Is that within this Stockton Division which you have described?      A. Yes, sir.

Q. Have you for a period of five years, yourself, been familiar with that particular stretch of track?

(Testimony of D. H. Talt.)

A. Yes, sir, I have gone over it a good many times in the course of my work.

Q. I call your attention particularly to the piece of track between Modesto and Salida. Have you been familiar with that particular piece of track?

A. Yes, sir.

Q. Mr. Talt, did you draw the two diagrams which are here on the blackboard?

A. These diagrams were drawn by one of my draftsmen under my supervision, and I personally took them into the field afterwards and verified them on the ground by measuring distances, and checking against the actual topography on the ground.

Q. So that they have been checked against actual field notes?

A. Yes, sir.

Q. On the upper one, which I think is still marked Court's [232] Exhibit 1, I want to call your attention to a series of devices between what has been identified as the track and the southward lanes of Highway 99, and ask you what that series of devices is intended to represent.

A. Those devices represent trees and bushes.

Q. I call your attention to the fact that there is apparently an island dividing the southward lanes of Highway 99 and the northward lanes of 99, and in that dividing island or strip there are also some devices. What are those intended to represent?

A. Those are trees and some bushes.

Q. In the lower of the two diagrams, Plaintiff's Exhibit 2, there are also similar devices between

(Testimony of D. H. Talt.)

the track and Highway 99, and then in the division strip or island in the highway: What do those represent?      A. Those represent trees and bushes.

Q. Who put those in there on those two diagrams?

A. They were put in under my direction from measured notes.

Q. Is the location of those trees and bushes guessed at or are they actually located?

A. No, sir, they were actually measured with a steel engineer's tape, graduated in feet, tenths and hundredths of a foot.

Q. Mr. Talt, I wish you would give me some measurements so that the jury may have them. I want to know the distance between Beckwith Road and North Road. [233]

A. Beckwith Road and North Road is 3989 feet, I believe. I think I have it here in my notes. 3579.6 feet.

Q. Now, measured along what line?

A. That is measured along the center line of the railroad track, and it is from the center line of Beckwith Road to the center line of North Road.

Q. May we have that again?

A. The distance is 3579.6 feet.

Q. If I may mark that on here. Can you give me the distance from some point with reference to Beckwith Road down to the turn-off for Dale Road, where it turns off Highway 99?

A. Yes, the distance from the center—

Q. No, no, from Beckwith Road, first.

A. From Beckwith Road?

(Testimony of D. H. Talt.)

Q. Yes.

A. To the center line, that is, this center line produced out here, it is 1162 feet.

Q. Produced out to what point on Highway 99?

A. Produced out to the center line of the highway.

Q. I will mark that, if I may, and from what point did you take from Beckwith Road?

A. The center line—opposite the center line of the crossing.

Q. Opposite the center line of the railroad crossing?

A. Yes.

Q. That is 1100—

A. And 62 feet. [234]

Q. Now, so that we may have it clear, Mr. Talt, will you give me from this same point in the intersection of Dale Road and Highway 99 to some point up there by Walnut Avenue the distance, so that we may have those distances?

A. Well, the distance to this fence here is 912 feet.

Q. Let me mark that, and either scaling it off the map or otherwise, can you give me the distance from the point of that fence to the center line of Walnut Avenue, so that we will know that?

A. Yes, I have that here. That is about 115 feet.

Q. I will mark that, if I may. Now, so that we may get it, Mr. Talt, I want you to take the center line of Beckwith Road and project it. Incidentally, are you familiar with the Government Survey of that country in there, the townships and sections?

A. Yes, sir, I have checked the section lines in

(Testimony of D. H. Talt.)

there against the county records at Modesto and also against our records, from our right-of-way maps.

Q. Is Beckwith Road located with respect to any section line?

A. It is along a section line, yes, sir.

Q. What about Walnut Avenue? How is that located?

A. Walnut Avenue is right in this side of the section line. It is 40 feet from the section line projected across here. It is 40 feet over to this side of Walnut Avenue.

Q. If the center line of Beckwith Road were projected across that field toward Dale Avenue now, where would it intersect [235] Dale Avenue?

A. They are both practically on the same line. The section lines go along here, this edge of the road, 40 feet over.

Q. What I would like to know, Mr. Talt, is what is the distance from the intersection of the center line of Beckwith Road and the railroad track over to the point where the projection of the center line of Beckwith Road intersects Dale Avenue, or Dale Road?

A. Well, it is practically 900 feet, lacking about 5 feet. I would say 895 feet.

Q. I will mark that, if I may. Take that to the center of Dale Road. A. Yes.

Q. 895 feet. A. 895.

Q. So that we may have it, from this same point at the intersection of Beckwith Road and the railroad track, the distance from there over to the gas



(Testimony of D. H. Talt.)

station—I think first we had better locate it. Which one of those buildings is the gas station?

A. The one this way (indicating). This is the gas station, in here, the Texaco Station.

Q. I will mark that, if I may. Now, if you will give us this distance I am going to mark here.

A. That is about 230 feet. [236]

Q. Will you please keep your voice up so everybody can hear? A. It is about 230 feet.

Q. Now, so the jury can orient themselves, what are the outside measurements of Highway 99, from the outside of the northbound lane to the outside of the southbound lane, so that it includes the full width of the four lanes and the island in the center?

A. About 75 feet from outside to outside of the two lanes.

Q. I am sorry, I didn't hear you.

A. About 75 feet from outside to outside of the two lanes.

Q. I will mark that. And from the center line of the railroad track to the nearest edge of Highway 99, what is that distance?

A. About 65 feet.

Q. I will mark that, if I may. Mr. Talt, you have on both of those diagrams lines, various lines, and then at various places on those lines are little crosses. What are those intended to represent?

A. These along here?

Q. Yes. A. Those are fence lines.

Q. In the lower of the two diagrams, No. 2, there is a fence line which would be geographically to the south of Beckwith Road. I want you to give me—was that map accurately located?

A. Yes, sir, that was accurately measured.

(Testimony of D. H. Talt.)

Q. At its end which is nearest to the railroad line I want you [237] to give me two measurements, one from the center line of the track at right angles to the track, to the end of the fence—no, to the end of the fence that runs along Beckwith.

A. Oh, the end of the fence here?

Q. That is correct.

A. From the center line of the track at right angles. [237-a]

A. That is 325 feet—no, no. Wait. The scale is different here. This is 20 foot to the inch. It is 65 feet.

Mr. Dunne: I will mark that, if I may.

Q. Now, I want you to give me the distance from the projection of those fence lines from this end out to the center of the track, that distance.

A. 90 feet.

Mr. Dunne: I will mark that, if I may.

Q. So we will relate it, from that same point measured parallel to the center line of the track, what is the distance to the end of the fence down to where such a line would intersect the Valley Brew sign?

A. This is the Valley Brew sign here. Mark it parallel with this fence line?

Q. Yes. A. About 460 feet.

Q. I will mark that, if I may, representing the 460— A. About 460 feet.

Q. Can you identify in the lower diagram the buildings that are indicated there in the corner of the intersection; do you know what they are?

A. These buildings here? (Indicating.)

Q. Yes.

(Testimony of D. H. Talt.)

A. Well, a house and this was a barn here and this was an outhouse or shed of some kind, a small shed. I am not sure [238] what this is, but I have it in my notes.

Q. Will you keep your voice up, please?

A. I am not sure what this one is back here. The house was here. I think that is an outbuilding there.

Mr. Dunne: I have no further questions.

Mr. Myers: I have no questions, your Honor.

The Court: All right. Step down.

Mr. Dunne: Mr. Brady.

The Court: I think we better take a short recess before we call the next witness.

(Recess.)

The Court: Proceed.

#### DUDLEY T. BRADY

called by the defendant, sworn.

The Clerk: Will you state your name to the Court and jury?

A. Dudley T. Brady.

#### Direct Examination

Q. (By Mr. Dunne): What is your business, Mr. Brady?

A. I am claims adjuster for the Southern Pacific Company.

Q. How long have you been a claims adjuster for the Southern Pacific?      A. Seven years.

Q. Are you such now?      A. I am. [239]

Q. Where are your headquarters now?

A. They are at Oakland Pier.

(Testimony of Dudley T. Brady.)

Q. What were your headquarters in October, 1945?      A. Oakland Pier.

Q. Mr. Brady, did you have occasion to take some steps toward investigating an accident, a crossing accident at Beckwith Road and the Southern Pacific Main Line from Modesto to Manteca, an accident that happened on the 11th of October, 1945?      A. I did investigate the accident.

Q. In connection with that, did you take some photographs?      A. Yes, I did.

Q. When were they taken, the first set?

A. The first set of photographs was taken the day following the accident, I believe.

Q. I show you a series of photographs in evidence here as Defendant's Exhibits A to I. These are all in evidence. Will you look at those quickly, please, and tell me if those photographs are photographs which you took as you have described.

A. Yes; I took these photographs, every one of them.

Q. When you took them, how did you take them; did you have your camera on a tripod or in your hand?      A. In my hand, at eye level.

Q. Eye level when you are standing?

A. I was standing with the camera in my hands like this, at eye level on the road. [240]

Q. What was at eye level, where was your range finder?      A. The finder is at eye level.

Q. Where is the lens, above or below that?

A. The lens is below the finder.

Q. I show you a photograph marked Defend-

(Testimony of Dudley T. Brady.)

ant's Exhibit L for identification. Did you take that photograph?      A. Yes, I did.

Q. What does that represent?

A. This photograph is—in other words, I was standing the east side of Highway 99 facing north on the north lane of Highway 99 and to the left of this picture is the intersection of North Road and Highway 99.

Mr. Dunne: We offer the photograph in evidence as our exhibit next in order. That will be L.

(The photograph in question was thereupon received in evidence as Defendant's Exhibit L.)

Q. (By Mr. Dunne): On this diagram, the top is intended to represent Highway 99, in along here; the two lanes to the east, the island in the middle and the two lanes at the south and the railroad track; here is North Avenue and here Beckwith Avenue. Where were you, as far as the diagram is concerned, when that photograph was taken?

A. May I see that a minute? I was right about here.

Mr. Dunne: I will mark that with an arrow pointing to the spot; that is the spot indicated by the witness and I will mark [241] that L. That was taken looking——

A. Looking north on Highway 99.

Q. Toward Beckwith Road?

A. Toward Beckwith Road.

Mr. Dunne: I will put an arrow from the arrow I have indicated indicating the direction the photograph is looking.



(Testimony of Dudley T. Brady.)

Q. I show you Defendant's Exhibit M for identification and ask you if you can tell me what that is.

A. This picture was taken one-tenth of a mile north of the intersection of North Road and Highway 99 facing north along the north lane of Highway 99.

Mr. Myers: Pardon me, your Honor. What date was that?

Q. (By Mr. Dunne): What date were they taken?

A. These pictures were taken in May, 1947.

Mr. Dunne: I will mark the point that that shows, mark that M.

Mr. Myers: Pardon me, your Honor. This picture was taken in May, 1947. It is two years after this accident happened. We don't believe they would be relevant at all as showing the conditions that existed on October 11, 1945. I was under the assumption that these pictures were taken the day following the accident. That is why I have been sitting here not objecting to them.

Q. (By Mr. Dunne): Mr. Brady, how long have you been familiar with that territory down there? [242]

The Court: Well, the foundation should be laid showing the physical condition was not changed. I think counsel is doing that now.

Q. (By Mr. Dunne): How long have you been familiar with that stretch of road along there?

A. The last five years.

Q. Have you been along there frequently?

(Testimony of Dudley T. Brady.)

A. I have been along there very frequently.

Q. With respect to the layout of the highway itself, that is the lanes of the highway and the island, were the conditions there the same at the time these pictures were taken as they were in October, 1945?

A. Yes, I would say the condition would be the same.

Q. What is that condition with respect to trees and shrubbery that are shown in these various photographs? Were these conditions substantially the same?

A. The conditions were, in my opinion, substantially the same.

Mr. Myers: Your Honor, may I ask this witness some questions on this foundation for these photographs?

The Court: If you want to you may.

Q. (By Mr. Myers): Mr. Brady, on October 11, 1945, did you go out to the scene of this accident and make observations as to the surrounding territory?

A. Yes, I did.

Q. What day did you go out there?

A. The day following the accident. [243]

Q. And did you take pictures out there that day?

A. Yes, I did.

Q. What pictures did you take that day?

A. The pictures of the intersection and the immediate vicinity.

Q. Well, when you say immediate vicinity, you mean just pictures of the Beckwith Road and the railroad track, do you not?

A. That's right.

(Testimony of Dudley T. Brady.)

Q. Did you go down to North Avenue?

The Court: Just a minute. That is cross-examination. This is not voir dire. That is the danger of cutting in. You may ask these questions on cross-examination.

Mr. Myers: May I present this to your Honor?

The Court: Surely.

Mr. Myers: Just one thing. This witness has said the conditions are the same. I want to find out about it.

The Court: Well, that is cross-examination. That is not voir dire. You will have your opportunity and if you wish me to, I will withhold ruling or admitting these photographs until you have examined him on cross-examination.

Mr. Myers: Thank you, Your Honor.

The Court: Cutting in is difficult because it is very hard to draw the line between the two and it is easy to get over into cross-examination.

Mr. Myers: Thank you, Your Honor.

The Court: Go ahead. [244]

Q. (By Mr. Dunne): This is M and we will offer it as our next exhibit in order. I understand Your Honor is reserving your ruling.

The Court: I will reserve the ruling. I will rule later. It will be marked for identification.

Q. (By Mr. Dunne): That is Defendant's Exhibit M. I will show you this, Exhibit N for identification, and ask you if you took that photograph.

A. Yes, I did.

Q. What does it depict?

A. This photograph is—I was standing on the

(Testimony of Dudley T. Brady.)

north lane of Highway 99 two-tenths of a mile north of the intersection of North Road and Highway 99.

Q. Are the things shown in that photograph—I call particular attention to the trees, shrubbery, growth, position of the highway—substantially the same as they were in October, 1945?

A. Yes, they are substantially the same as at the time of this accident.

Q. Obviously, the trees grow in the meantime to some extent.           A. Correct.

Mr. Dunne: We offer that as our exhibit next in order; that is N.

The Court: I will reserve ruling on it.

Q. (By Mr. Dunne): I show you Defendant's Exhibit O for identification and ask if you can tell me what that is. [245]

A. This picture was also taken from the north lane on Highway 99 facing north, three-tenths of a mile north of the intersection of North Road and Highway 99.

Q. Were the conditions shown here substantially the same as in October, 1945?           A. They are.

Q. I show you Defendant's Exhibit P for identification. What is that?

A. This picture is also taken on the north lane of Highway 99, facing north, one-half mile north of the intersection of North Road and the Highway 99. To the right of the picture represents Dale Road.

Q. Are the things shown and depicted in that

(Testimony of Dudley T. Brady.)

picture as you hold it before you substantially the same as they were in October, 1945?

A. They are.

Mr. Dunne: We will offer this as our next exhibit in order.

The Court: I will reserve a ruling.

Q. (By Mr. Dunne): Finally, Defendant's Exhibit Q for identification; what is that?

A. This photograph was taken at the intersection of Dale Road and Highway 99 and is facing north; at the east edge of the north lane on Highway 99 there is shown Dale Road branching off to the right and Highway 99 is to the left of the photograph. [246]

Q. Does that photograph as you have it before you substantially represent conditions as they existed in October, 1945? A. Yes.

Mr. Dunne: We will offer that as our exhibit next in order.

The Court: Ruling reserved.

Q. (By Mr. Dunne): I show you another photograph which is not yet marked and ask you if you will tell me what that is.

A. This photograph faces, I would say, generally a north direction on Dale Road and I was standing approximately 50 feet east of the north lane of Highway 99.

Q. Is what is depicted in that photograph substantially representative of the conditions as they existed in October, 1945? A. Yes.

Q. With that photograph before you and Defendant's Exhibit Q for identification, can you tell



(Testimony of Dudley T. Brady.)

me where the camera was when those photographs were taken; was it in the same place or had you shifted position?

A. The camera was at the same location, only I had shifted my position towards the left to reveal the entire intersection including Dale Road and Highway 99.

Q. In other words, so there is no question about it, it shows a panoramic sweep of that intersection?

A. It does, yes.

Mr. Dunne: We offer it and since your Honor is reserving [247] the ruling, it should be now marked for identification.

The Court: Mark it for identification.

(The photograph marked Defendant's Exhibit T for Identification.)

Q. (By Mr. Dunne): Mr. Brady, with Defendant's Exhibit T for identification before you, I want to show you now three photographs which I have clamped together and ask you whether or not you took those three photographs.

A. Yes, I did.

Q. Where was the camera as to its location at a point on the ground when those three photographs were taken, was it in the same position in all three?

A. Yes, it was. The three photographs were taken at the same location. In other words, I just pivoted in taking the three distinct pictures.

Q. So that when pieced together as is indicated in the photograph before you——

A. That is right.

(Testimony of Dudley T. Brady.)

Q. They make three photographs showing substantially the conditions as they existed in October, 1945? A. Yes, they do.

Q. I would like to tie those in with Defendant's Exhibit T for identification. Is there anything on Exhibit T for identification which shows the intersection or part of the crossing of Dale Road and Highway 99 that ties in with anything on these [248] three photographs that have been pieced together? Perhaps before you answer that, so I can do it properly on the record, let me take those three photographs. I will offer them in evidence and ask that they be marked so we can identify them.

The Court: All right. It will be Defendant's Exhibit U for identification. I will reserve a ruling.

(Photographs pieced together were thereupon marked Defendant's Exhibit U for Identification.)

Q. (By Mr. Dunne): Exhibit U, the three photographs pieced together, is there anything on there that serves to tie that in with anything on Exhibit T for identification?

A. By referring to Exhibit T, there is an automobile part on the right lane of Dale Road and referring to Exhibit U—is that right?

Q. Yes.

A. U, on the right side of this panoramic picture you will see the left front fender of an automobile, which is the same automobile as in Exhibit

(Testimony of Dudley T. Brady.)

T, and this first picture was taken facing north on Dale Road. Then I would pivot to get the area in the next picture and then I would pivot further, and there is a picture of a telephone pole. This telephone pole is devoid of any placards or signs.

Q. Now you are talking about Exhibit U?

A. I am talking about Exhibit U. This third picture, Exhibit U, the pole on the picture is devoid of any placard whereas by [249] referring back to Exhibit T, it will be noted on the lefthand there is a placard on the first pole and this second pole is devoid of any placard.

Q. The pole is the pole that shows to the extreme left as you look at it, of Exhibit U.

A. This pole is the second pole from the intersection of Dale Road and Highway 99.

Q. It is the second pole that shows up in Defendant's Exhibit T?

A. Correct. The pole in this picture is the second pole in this picture (indicating). [250]

Q. On Exhibit U the second pole has been indicated as marked, is that correct?

A. That is correct.

Q. Likewise at the top there is an arrow pointing down and pointing to "Valley Brew sign." Do you recognize in the distance the Valley Brew sign?

A. Yes, I can see the Valley Brew sign, the back part of the Valley Brew sign.

Q. There is also indicated at the top with an arrow pointing down, "Gas Station." What gas station is that?

(Testimony of Dudley T. Brady.)

A. That is correct. That is what we have called the Texaco Gas Station. I understand——

Q. Not what you understand, but just where it was located.

A. There is a Texaco Gas Station located opposite the Beckwith Road crossing.

Mr. Dunne: I have no further questions.

### Cross-Examination

Q. (By Mr. Myers): Do I understand, Mr. Brady, that you are an investigator employed in the office of the Claims Department of the Southern Pacific Company?

A. No, I am a claim adjuster for the Southern Pacific Company.

Q. Are you a photographer, too?

A. Well, I can take pictures, but I am not——

The Court: Q. You are not a professional?

A. I am not a professional photographer. [251]

Mr. Myers: By the looks of the pictures, he is a good amateur, anyway, your Honor.

The Witness: Thank you.

Q. (By Mr. Myers): You went to the scene of this accident the day following, is that correct?

A. That is correct.

Q. Did you go down there that day to take pictures or to investigate?

A. We went down to investigate the accident and to take photographs.

Q. In other words, to do both?

A. That is correct.

Q. When you went down there that day——

(Testimony of Dudley T. Brady.)

Mr. Dunne: Mr. Brady, will you keep your voice up? I have trouble hearing you.

Mr. Myers: No trouble hearing me, I take it?

The Court: He is asking the witness.

Q. (By Mr. Myers): When you went down that day to take photographs, will you just pick out from this group, here, which are in evidence, the ones that you took the day following the accident when you were down there? Which is the group that you took?

A. This is the group of pictures I took the day following the accident (indicating).

Q. In looking at this group of pictures, will you tell his [252] Honor and the jury what is the farthest point you were from the railroad tracks at Beckwith Road, at any time when this group of pictures was taken the day following the accident?

A. Do you want me to take the distance on each one of these pictures?

Q. No, I do not want to be that exact about it. I want the maximum distance you were away from the railroad tracks at Beckwith crossing on the day following the accident when you took that group of pictures, any of them?

A. This picture here is——

Q. Pardon me. I do not mean to have you go through them one by one.

The Court: He wants a general idea as to all.

The Witness: As to all of them?

The Court: Yes.

The Witness: This one here is about 600 feet



(Testimony of Dudley T. Brady.)

west of the crossing, the Beckwith Road crossing.

Q. (By Mr. Myers): In other words, this is down Beckwith Road looking up at the crossing?

A. That is right, facing east on Beckwith Road.

The Court: Identify that for the records; I mean the exhibit number.

The Witness: Exhibit A.

Q. (By Mr. Myers): That is looking east on Beckwith Road 600 feet down. All right. [253]

A. Exhibit B was 300 feet from the crossing proper of Beckwith Road facing east.

Q. In other words, down the same road, or facing east?

A. Right. This picture was on the north edge of Beckwith Road 300 feet from the crossing proper.

Q. Practically the same position except 300 feet from the crossing, is that right?

A. That is right, only on the north edge of the highway. This one was taken from the center of Beckwith Road 200 feet from the crossing proper.

Q. So far we are all on Beckwith Road now looking down to where this accident happened on the right of way?

A. That is right. This one was taken at the north edge of Beckwith Road, 200 feet from the crossing proper.

This was also taken on the north edge of Beckwith Road 125 feet from the crossing proper.

This was taken from the center of Beckwith Road facing east 75 feet from the crossing.

This one was taken on the north edge of Beck-

(Testimony of Dudley T. Brady.)

with Road, 75 feet from the crossing proper, facing about southeast along the railroad right-of-way; in other words, facing towards Modesto.

Q. You are still in the vicinity of Beckwith Road facing northeast? A. No, south. [254]

Q. Southeast?

A. Let's see. Is this the railroad tracks?

Q. I think that is the railroad.

A. This was taken right here (indicating). That is Exhibit H.

Mr. Dunne: May I suggest again, Mr. Brady, when you and Mr. Myers are having a private conversation there I can't hear, and I do not think the jurors hear.

Q. (By Mr. Meyers): Up to the present point in these exhibits they are all taken from Beckwith Road looking either east or southeast. The last one was a little southeast, is that right?

A. This is southeast.

Q. That is Exhibit H?

A. Exhibit H. This is Exhibit I, facing southeast along the railroad right-of-way, 75 feet from the crossing.

Q. You are still in the vicinity of Beckwith Road, 75 feet from the crossing, is that right?

A. Correct.

Q. All right.

A. Exhibit J is facing north along the railroad right-of-way, six rail lengths from Beckwith Road, showing the approach of the train involved.

Q. In other words, this is looking what?

(Testimony of Dudley T. Brady.)

Towards Modesto or towards San Francisco? [255]

A. This is looking towards Manteca.

Q. That would be toward San Francisco?

A. Facing north.

Q. And looking right along the railroad track?

A. Six rail lengths from Beckwith Road.

Q. That is Exhibit J, is that right?

A. Yes. Exhibit I is taken three rail lengths south of Beckwith Road crossing, showing——

Q. In other words, three rail lengths down this way toward Modesto facing north, is that right?

A. Yes, right here on the railroad track.

Q. Facing north?

A. Facing north. That is three rail lengths. Exhibit 2 was taken approximately 25 feet from the railroad tracks or crossing proper on the south edge of Beckwith Road, facing south along the railroad right of way.

Q. About in this position?

A. Right about here (indicating).

Q. And that is facing down the right-of-way?

A. Facing right straight down the right-of-way. This is Exhibit 3, taken on the south edge of Beckwith Road, approximately 50 feet from the crossing proper.

Q. So you are still in the vicinity of the crossing here on Beckwith Road?

A. That is right. [256]

Q. Within 50 feet of it?

A. 50 feet of the crossing proper. This is Exhibit 7.

Q. Did you take those pictures now, Exhibit

(Testimony of Dudley T. Brady.)

7, or were your pictures limited to the ones lettered?      A. I took these pictures.

Mr. Myers: All right. Your Honor, there is no point in it, and I do not want to confuse the witness. The ones that are numbered are our exhibits and the pictures that we had taken.

The Court: He has identified them, anyway. He evidently knows the locality.

Mr. Myers: That is right.

The Court: If you do not want to examine him as to those——

Mr. Myers: I do not want to take the time on it, because all I am trying to find out is where he was on this particular day.

The Court: Let the rest of them go, because they are photographs. You seem to know the locale. He does not want to check any except those that you took, yourself.

Q. (By Mr. Myers): Look on the back of those, and if they have numbers on them we will pass those, because they are plaintiffs' exhibits.

A. I can see that. I can see they are marked Plaintiffs' Exhibits. Evidently I did not take that picture.

The Court: Let me look at them. [257]

The Witness: This is Plaintiffs' 9.

The Court: We are wasting time. All of these are plaintiffs' Exhibits.

Mr. Meyers: All right.

The Court: There is no use to waste time.

Q. (By Mr. Myers): Mr. Brady, did you ever

(Testimony of Dudley T. Brady.)

go to the scene of this accident any time after that for taking pictures until 1947?

A. Would you repeat that question?

(Question read.)

A. No.

Q. And it was what time in 1947 that you went there?

A. The middle part of May, 1947.

Q. What month was it again in 1947.

A. May, 1947.

Q. Will you just take these? In order to save time, take each one of these exhibits, and with your pencil show the jury where you were with your camera when you took each one of these pictures marked for identification. Take your pencil or take a pointer and show where you were.

A. I took this photograph right here (indicating).

Q. What number is that?

A. This is Defendant's Exhibit Q.

Q. The next one is what?

A. Defendant's Exhibit P. [258]

Q. Where were you when you took that one?

A. I took this photograph approximately here (indicating).

Q. In what direction was your camera facing there?

A. It was facing north on Highway 99.

Q. Incidentally, in Q your camera was facing in what direction?

A. Well, it was facing in a general north direction. I would say it is north.



(Testimony of Dudley T. Brady.)

Q. Your next exhibit?

A. This is Defendant's Exhibit O: .3 of a mile north of the intersection of North Road and Highway 99. I would say it was taken approximately right here (indicating).

Q. That number is what?

A. Defendant's Exhibit O.

Q. And your camera was facing in what direction?

A. Facing north in the north lane of Highway 99.

Defendant's Exhibit N was .2 of a mile north of the intersection of North Road and Highway 99. It was taken, I would say, approximately here (indicating).

Q. That is number what?

A. Defendant's Exhibit N.

Q. And your camera was facing in what direction?

A. Facing north on the north lane of Highway 99.

Defendant's Exhibit M was taken .1 of a mile north of the intersection of North Road and Highway 99, facing north on Highway 99. It was taken about—it was taken approximately here (indicating).

Q. And that number is what, sir? .

A. Defendant's Exhibit M.

Q. Defendant's Exhibit M, and your camera is facing in what direction?

A. North on Highway 99. This photograph was taken, Defendant's Exhibit T, facing, I would

(Testimony of Dudley T. Brady.)

say, northeast along Dale Road, at the intersection of Dale Road and Highway 99.

Q. Approximately the same position as Q?

A. Approximately the same position as Q.

Q. Except facing—

A. It was taken right about here.

Q. That is T, and your camera was facing in what direction here?      A. Facing northeast.

Q. The direction that Dale Road runs?

A. Facing right along Dale Road.

Q. All right. What is your next one?

A. Defendant's Exhibit U, the panoramic taken approximately 100 feet north of the intersection of Dale Road and Highway 99.

Q. Is that about where you have the circle drawn there?

A. No, I would say right about—well, right about here (indicating).

Q. And that is Exhibit U? [260]

A. Defendant's Exhibit U.

Q. And you faced three directions in that exhibit, did you not?

A. It is a panoramic shot.

Q. There were three directions; the direction of Dale Road was one of them?

A. Yes, there was the direction of north and, you might say, northwest. [260-a]

Q. North, northwest and what else?

A. Two of them were taken about north and then the other one was about northwest.

Q. You have three there, have you not?

A. Yes.

(Testimony of Dudley T. Brady.)

Q. So you have two of them about north, you say, and the other about northwest, is that right?

A. Approximately, a little more this way.

Q. A little more west then?

A. Northwest. It would be over this way.

Q. Mr. Brady, let me ask you: Did you ever go to the positions that you have marked at L, M, N, O, P, Q, T and U on this map the day after this accident happened when you were down there taking the original pictures?

A. Yes, I drove along that same route the day following the accident.

Q. Did you stop in each and every one of those positions and face the direction that you had your camera facing in 1947 when those pictures were taken?

A. No, I didn't stop.

Q. You didn't stop. So as a matter of fact, you are unable to say whether or not the conditions are the same in 1947 when you took those pictures in those positions as they were the day following the accident?

A. I would say the conditions are relatively the same when I [261] took the pictures in 1947 as they were when the accident occurred.

Q. How about the foliage? Would you expect more foliage in May in the year or in October of the year?

A. Well, I would say the foliage would be about the same in October.

Q. You would expect the leaves to be falling from those trees in October?

The Court: You don't know that climate. That is a tropical climate.

(Testimony of Dudley T. Brady.)

Mr. Myers: I was raised in Merced, your Honor.

The Court: They do not begin to fall in October.

The Witness: They don't fall. I would say they are the same.

Mr. Myers: I was raised on a farm near Merced.

The Court: Your recollection and my recollection may not be the same, so go ahead and inquire.

Q. (By Mr. Myers): In any event, with reference to foliage on those trees, you are unable to say that the foliage was the same in 1947 as it was the day following this accident?

A. I would say the foliage was relatively the same.

Q. The trees had not grown any in those last two years?

A. Well, possibly grown a little, not much.

The Court: Just a moment. The witness had not finished his answer. He did not know whether that was a statement or a [262] question.

Q. Had you completed your answer.

A. I said possibly they may have grown an inch or so, their branches. That is kind of hard to say definitely.

Q. (By Mr. Myers): What kind of trees were those growing in this vicinity where you took those pictures.

A. They are gum trees, to my recollection, and oleander bushes.

Q. Gum trees and——

A. That is my recollection; possibly a few gum trees and there may be what they call bay trees.

(Testimony of Dudley T. Brady.)

Q. And that was your observation on October 12, 1945, and that was your observation in May 1947, that they were gum trees and oleander bushes?

A. That is right.

Q. When you went out in 1947 and took those pictures from the positions that you have indicated, did you by any chance from those same positions turn your camera across Highway 99 towards the railroad track and take any pictures?

A. Will you repeat that question?

(Question read.)

A. Yes, I did.

Q. Where are those pictures?

A. In 1947—some pictures are not here. This picture is facing toward the railroad tracks. This is taken in 1947, Defendant's Exhibit L. [263]

Q. That is in evidence? A. Yes.

Q. This is L here, is that right (indicating on diagram)? In answer to Mr. Dunne's question—

The Court: Yes, he placed the location there.

Q. (By Mr. Meyers): That is L, and then you placed, I believe, an arrow here showing the direction the camera was facing, and the camera at that time, you stated just a moment ago, was facing in a general westerly direction, was it not, northwesterly direction along the railroad tracks?

A. It was facing in a general northerly direction.

Q. Mr. Witness, here is your arrow on this map. It was facing in a general northerly direction; it was pointing this way, it was not pointing toward the tracks, was it?



(Testimony of Dudley T. Brady.)

A. That was my memory. At the time I stated I overlooked the compass mark.

Q. What is the fact?

A. That is my impression of the direction.

Q. What is the fact as to the direction your camera was pointed?

A. The actual fact, according to the compass mark there, is northwest.

Q. In other words, it is pointed up Highway 99?

A. Up Highway 99 and toward the railroad tracks.

Q. This arrow then should swing a little bit toward the [264] railroad tracks?

A. It would be northwest, over this way here (indicating).

Q. Did you take any others that were pointed over to the railroad tracks?

A. Yes, I did.

Q. Will you show me those photographs, please.

A. Well, they are not here. There are some others.

Mr. Dunne: They are right here if you want them. I didn't put them in evidence. There are two taken down on North Road.

The Court: Counsel has indicated he has them and has not offered them yet.

The Witness: There is the panoramic shot.

Q. (By Mr. Myers): That is U. That is the one you took from over here at position U, and that was pointed northwesterly and more westerly. In other words, your three positions, is that right?

A. The three positions I mentioned before, one

(Testimony of Dudley T. Brady.)

this way, and the other picture was taken this way, and the third picture was taken this way (indicating).

The Court: Both of you are covering the jurors.

The Witness: Pardon me.

Mr. Myers: Let's see Exhibit U.

The Court: Why don't you have him indicate the direction for each portion of that exhibit U, being a panoramic picture? [265] Will you do that, Mr. Witness?

The Witness: Defendant's Exhibit U. The camera is facing north and northwest along Dale Road, Highway 99, and the railroad tracks, covering this area in here (indicating).

Q. (By Mr. Myers): In other words, you faced west on that, too?

A. Faced north and the other two pictures, northwest.

Q. Did you take any other pictures between your point L and your point U facing from Highway 99 towards the railroad track?

A. Yes, I did.

Q. Is this one of them?

A. This is not marked.

The Court: We will mark it if you answer that question.

The Witness: This is facing——

Q. (By Mr. Myers): Just point where it was taken from.

A. It was taken from the east edge of Highway 99 facing west along North Road, which you see in the background.

(Testimony of Dudley T. Brady.)

Q. Facing along North Road, is that right?

A. Yes.

Q. Make an arrow so it is facing down North Road, is that correct?      A. That is correct.

Mr. Myers: I guess that should be marked, your Honor.

The Court: Do you want to offer it?

Mr. Myers: I have no purpose to offer it, excepting as to put a mark on it next in order. [266]

The Court: If you are not going to offer it, what is the use of examining the witness about it?

Mr. Myers: I will offer it. There is no reason for me not offering it, just as long as it has a number, that is all.

The Court: You will take it as yours, won't you?

Mr. Dunne: Certainly.

The Court: Give it a defendant's number.

Mr. Myers: We will offer it in evidence, your Honor.

The Court: We will put it in as Defendant's exhibit and keep the continuity that way.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit V.)

Mr. Myers: Q. From the position of your camera when this picture was taken, you have a perfectly open view toward the railroad track?

A. Defendant's Exhibit V is an open view directly opposite the intersection of North Road and Highway 99.

Q. Where else were you when you took any of

(Testimony of Dudley T. Brady.)

the pictures between L and, I am sorry, your Honor, the number of this is what?

The Court: V.

Mr. Myers: Q. —V, and you had better label this on the map as being point V. In between point V and the point Q, where else were you when you took pictures toward the railroad tracks in 1947?

A. I am certain the pictures I took were along here, which showed the railroad right-of-way, the tracks. [267]

Mr. Myers: May I ask, your Honor, if counsel has that picture?

Mr. Dunne: As far as I have any knowledge, there are three taken on North Road west of the railroad track. They would not respond to your inquiry. There is another one taken indicating the intersection of Highway 99 and Dale Road which would be the third. Of two that are taken here, one looking over toward the railroad track—I have two others here taken along Highway 99 but one along Dale Road looking in the direction of the railroad track (handing photographs to counsel).

Mr. Myers: This photograph was taken from where?

A. It was taken on the east edge of Highway 99 at the intersection of Dale Road and Highway 99 facing northwest—

Q. Show us here (referring to the diagram).

A. Right about here (indicating).

Q. Facing this direction, northwest. We will make an arrow facing that direction.

(Testimony of Dudley T. Brady.)

The Court: That has not been marked. We will mark that X.

Mr. Myers: W.

The Court: Yes, W. I forgot; we did not have a W. Put a W on it. The Clerk will mark it.

(Photograph was thereupon marked Defendant's Exhibit W for identification.)

Mr. Myers: Q. This last one that counsel gave me is a picture of what? [268]

A. This photograph is looking southwest from this point here, southwest at the intersection of North Avenue or North Road and Highway 99. In other words, it is on the west side of Highway 99, out here.

Q. All right. That would be X, your Honor.

The Court: Yes; mark that.

(Photograph was thereupon marked Defendant's Exhibit X for identification.)

Mr. Myers: Q. And in what direction was your camera facing then?

A. It was facing southwest.

Q. Southwest. Was that this direction here?

The Court: Hand that to the Clerk.

Mr. Myers: Q. Those are all, Mr. Brady, pictures at least that you have been shown that were taken from along 99, that were taken over toward the railroad tracks in May, 1947?

A. Yes. Those are the pictures that I explained.

Q. So you did not take any pictures between V or L and P in 1947 pointing towards the rail-



(Testimony of Dudley T. Brady.)

road track?           A. Between V and P?

Q. V and L. Pardon me. Between V and P—between the V and P you took no pictures from Highway 99 at any point in there with your camera pointing over to these trees towards the railroad track.

A. I believe these pictures would be of the railroad track. [269]

Q. Yes, but you have marked them. You marked one here and then you marked another one in here; is that right?           A. That's right.

Q. But between P and V you did not take any pictures pointing toward the railroad track?

A. Not pointing directly toward the track, but I pointed north along Highway 99 which reveals the track at the other direction.

Q. As a photographer, you know if you have some trees like that, if you take a picture looking in the direction the row of trees is, you get a more solid picture than if you take a photograph crosswise.           A. True.

Mr. Myers: That is all.

#### Redirect Examination

Mr. Dunne: You get the same effect as a driver driving along the highway could, don't you, if you are traveling along the highway?           A. Yes.

Mr. Dunne: No further questions.

The Court: At this time I reserved ruling on those photographs. Unless there is any further objection I am ready to rule.

Mr. Myers: No, your Honor. My only objection

was the conditions are not the same. That was the objection. [270]

The Court: Well, that goes to the weight. The witness has testified that in his recollection and being familiar with the places that there has been no substantial change except the possible intimation there may have been some leaves early when he took the pictures and the trees might have grown. That goes to the weight. You can argue that for that jury. The objection will be overruled. The exhibits which have been marked for identification—how far have we gone? We went as far as U. Where did we begin?

Mr. Dunne: I think we begin with L.

The Court: They will be received in evidence and given the proper numbers.

(Defendant's Exhibits L through X, inclusive, were thereupon received in evidence.)

The Court: Will you indicate who your next witness is going to be so the bailiff will have him available here when we begin?

Mr. Dunne: Our next witness, I think, will be Mrs. Krebbs.

The Court: Will you tell the lady to be right here at 2:00 o'clock.

Ladies and gentlemen, we are about to take adjournment until 2:00 o'clock this afternoon. The Court admonishes you not to talk about this case among yourselves or anyone else and not to form an opinion until the case is finally submitted to you.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [271]

Afternoon Session, Thursday, July 22, 1948,  
2:00 o'clock

The Court: Proceed, gentlemen. I am sorry I was delayed. I haven't left my chambers since we adjourned.

IZETTA N. KREPPS

called by the defendant, sworn.

The Clerk: Q. Will you state your name?

A. Izetta N. Krepps.

Direct Examination

Mr. Dunne: Q. Mrs. Krepps, where do you reside? A. I live on Curtis Road now.

Q. Where did you live in October, 1945?

A. On Beckwith.

Q. A little bit outside of Modesto?

A. Yes; that's right.

Q. Mrs. Krepps, I want to show you—I don't know whether you will understand these two diagrams here—this diagram, these lines going in through here are supposed to represent Highway 99. These two lines here with the red line between them are intended to represent the Southern Pacific Railroad tracks. These lines down here are intended to represent Beckwith Road. Over on the far side of Beckwith Road these squares are intended to represent various buildings and the same below, on the diagram below the tracks; these various devices are intended to [272] represent buildings. Is the place where you were living shown on that

(Testimony of Izetta N. Krepps.)

diagram?           A. Yes, it is.

Q. Which place was it, Mrs. Krepps?

A. I think it would be this one, right here.

Q. I will mark that. I will mark that with a K. This Defendant's Exhibit C, a photograph. I wonder if you recognize that.

A. Yes, I do. That is the grape vines along the Beckwith Road.

Q. Along the fence by your property?

A. No. These grape vines are the ones that Ben Brubaker had that adjoins onto our place.

Q. In the background just barely behind the trees is shown the roof of a house.

A. Yes, that is my house.

Q. That is your house. Do you recall an accident, a collision between a Southern Pacific engine, locomotive engine, and an automobile in which there were some members of the Souza family on the 11th of October, 1945?           A. Yes, I do.

Q. Calling your attention to that day, Mrs. Krepps, where were you; were you at home on that day?

A. Yes, I was. It was in the morning.

Q. Did you learn of the accident that morning?

A. Yes. [273]

Q. How did you learn of the accident?

A. Well, I was out at the wash house washing clothes and I come around the hedge to the clothes line and went to hanging my clothes and I heard the train whistle and it whistled and whistled and then I heard it crash and I run around the corner of the house and saw the car.

(Testimony of Izetta N. Krepps.)

Q. This lower diagram, Mrs. Krepps, is on a different scale but it is intended to represent the intersection there and these heavy squares down toward the bottom are intended to represent various buildings. It has been intended, and I don't want to suggest this to you, I want you to tell me, which of the various buildings, if you know from the placing of them there, was your house.

A. My house?

Q. Yes. I mean if you can tell from the diagram. I want you to show it if you can tell it but if you can't tell from the diagram I want to find out. Which was the house and where were you washing and where was the clothesline?

A. I would say that one down there at the bottom was my house—no, the next one down there—right where your hand is.

Q. This?           A. Yes.

Q. Where was the wash house?

A. The wash house was about where that line, the little circle is—do you see that right there?

Q. Right there?           A. Yes.

Q. I will draw a line and mark that W.

Q. What kind of a day was it?

A. It was a nice day, nice, clear morning.

Q. Was there any fog, rain or haze?

A. No.

Q. Did you notice, or can you tell us anything about the bell on the locomotive, whether that was ringing or not?

A. No, I don't. I don't remember any bell.



(Testimony of Izetta N. Krepps.)

Q. Did you actually see the locomotive and the automobile come together? A. No, I did not.

Q. Are you able to tell us and if you can't, please say so, anything about the speed, how fast the locomotive was going?

A. No, I couldn't say that.

Q. Aside from you and your immediate family, was anybody else living there at the time with you?

A. My daughter was there with me.

Q. What is her name?

A. Melvina Disbrow.

Q. She was married? A. Yes.

Mr. Dunne: I have no further questions. [275]

#### Cross-Examination

Mr. Myers: Q. Mrs. Krepps, at the time of the happening of this accident you were hanging out your clothes, were you not?

A. That is right.

Q. Your clothesline was located in your back yard on the south side of your house, is that correct? A. That is right.

Q. While you were hanging out your clothes you heard a train whistle, is that true?

A. That is right.

Q. And you could not tell from the whistle how far the engine was from the intersection when you heard it, could you? A. No, I could not.

Q. In the middle of one of the whistles you heard a crash, isn't that true? A. Yes.

Q. And then you ran around to the north side

(Testimony of Izetta N. Krepps.)

of your house and looked toward the crossing, is that correct?      A. That is right.

Q. And you saw the car?

A. I saw the car up against the post.

Q. It was all smashed up, is that right?

A. Yes.

Q. These whistles that you heard were two or three short blasts [276] of the whistle, is that true?

A. That was after the crash. Then rang three short whistles after it hit.

Q. But in the middle of one of the whistles you heard this crash?      A. Yes.

Q. There was no difference between the whistle, in the middle of which you heard the crash, and the whistle that you heard after the crash, was there?

A. Well, I don't know. I know there was whistling and all at once I heard the crash, and then it whistled, I think, three times after that.

Q. How many times did it whistle before that?

A. Gosh, it was whistling when it was coming down the track before the crash.

Q. You recall that there was more than one whistle?

A. Yes, there was more than one whistle.

Q. Do you recall, Mrs. Krepps, a young man by the name of Glenn Griek, who called on you on October 29, 1945, and discussed this case with you?

A. Was that for the Southern Pacific Company?

Q. What is that?

(Testimony of Izetta N. Krepps.)

A. Was that for the Southern Pacific or for Souza, the man who called on me?

Q. Do you remember a gentleman by the name of Mr. Griek?

A. No, I know there was a young fellow who came there for [277] Souza, too, and talked to me.

Q. On October 29th?

A. I don't know just when it was.

(Mr. Myers handed a statement to Mr. Dunne.)

Mr. Dunne: You may read that. I have no objections.

Mr. Myers: Q. Mrs. Krepps, is this your signature at the bottom of this page (indicating)?

A. It looks like it.

Q. And is this your signature on the second page? A. It looks like it.

Q. Do you recall on October 29th Mr. Griek took a statement such as this?

A. I guess that is right, but I don't remember signing that. But I remember the fellow coming there and talking to me.

Q. That is your signature, isn't it?

A. Yes, it looks like my writing, all right.

Mr. Myers: I will offer that in evidence, your Honor, as Plaintiff's Exhibit next in order.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 11.)

(Testimony of Izetta N. Krepps.)

Mr. Myers: I would like to read it, if your Honor please.

The Court: After you have completed with the witness.

Mr. Myers: Q. Mrs. Krepps, where you live, or where you lived at the time of the happening of this accident, is only a very short distance from the railroad tracks, is that right? [278]

A. That is right.

Q. And engines and trains frequently pass there? A. Yes.

Q. Do you know when it was that you left that locality?

A. It was in April, I think, the 5th or 6th of April of last year.

Q. You discussed this case with someone from the Southern Pacific Company, too, did you not?

A. That is right.

Q. Was that before or after the time this statement was given? A. Before that one.

Q. In other words, this statement was taken on October 29th. Before that time you had talked to someone of the Southern Pacific Company, is that right? A. Yes.

Mr. Myers: I would like to read this, your Honor.

The Court: Go ahead.

Mr. Myers (Reading): "I am Szetta Krepps, of Route 2, Box 1170, Modesto, California. Referring to an accident that happened on the Beckwith Road and the Southern Pacific Railroad on October

(Testimony of Izetta N. Krepps.)

11, 1945, at about 9 a.m., involving a coupe driven by John M. Souza, of Modesto, and a switch engine of the Southern Pacific Railroad, I state I was working around my house on the above mentioned date and the above mentioned time, hanging out clothes. My [279] house is located at the corner of Beckwith Road and the 99 Highway in the southwest corner. My clothesline is in my back yard or on the south side of the house. I heard a train whistle. I couldn't tell how far the train was from the intersection by the whistle. In the middle of one of the whistles, I heard a crash. I ran around to the north side of my house and looked toward the crossing. I noted a car all smashed up on the northeast side of the tracks. I couldn't see the train, as it had gone on down the tracks. About two minutes later the train backed up to the scene of the accident. I saw a lot of people running to the scene to help the people out of the car. I didn't go to the scene of the accident.

"I have read the above statement of one page and believe it to be a true and correct statement to the best of my knowledge.

Szetta M. Krepps."

Mr. Myers: That is all.

Mr. Dunne: I have no questions.

The Court: Step down, Mrs. Krepps. These witnesses may be excused to return to their work.

MELVINA DISBROW,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your full name?

A. Melvina Disbrow.



(Testimony of Melvina Disbrow.)

Direct Examination

Mr. Dunne: Q. Mrs. Disbrow, where do you live?

A. I live at M.G. 6, Veterans Court, Modesto.

Q. Where were you living in October of 1945?

A. I was living at Route 2, Box 1170, Modesto.

Q. Are you any relation to Mrs. Krepps, who just left the courtroom?

A. I am her daughter.

Q. Where were you living with respect to your mother in October, 1945?

A. I was living with my mother.

Q. At her home? A. At her home.

Q. Where was that?

A. At Beckwith and 99 Highway. It is the first house on the left.

Q. The first house on the left as you turn from 99 into Beckwith?

A. From 99 into Beckwith.

Q. Do you recall the occasion when there was a collision at that crossing, the Beckwith crossing and the railroad tracks, between a Southern Pacific engine and an automobile, in which there were some members of the Souza family? A. Yes.

Q. Where were you at the time that accident happened? [281]

A. I was up in my bedroom in bed.

Q. We do not want to inquire unnecessarily into your affairs, but to know what you were doing, do you recall what you were doing at the time of the accident? A. I was reading a book.

(Testimony of Melvina Disbrow.)

Q. What, if anything, first called your attention to the fact that there was an accident?

A. My attention was drawn from my book by the insistent whistling of the train. The train whistled more than it usually did when it made the crossing there, and I heard a crash, but I didn't pay too much attention to it until my mother called me and said there had been an accident.

Q. Did you go to the scene of the accident?

A. I went out on the road. I didn't go too near it.

Q. Of course, you did not see the accident, itself?

A. No.

Q. Did you see the train before the accident?

A. No.

Q. Can you tell us whether or not the bell on the locomotive was ringing?

A. No, I didn't hear the bell.

Mr. Dunne: I have no further questions.

#### Cross-Examination

Mr. Myers: Q. Did you ever, while you were in your bedroom, hear a locomotive go by ringing a bell? [282]

A. I don't remember. It has been so long since I have lived there, and we got so used to the trains going by we never paid much attention to them.

Q. And you got used to train whistles, as well as bells, didn't you?      A. Yes.

Q. So that a train whistling or a bell ringing on a locomotive wasn't any unusual occurrence?

A. No.

(Testimony of Melvina Disbrow.)

Q. Mrs. Disbrow, whom have you talked this case over with? A. My friends, Mr. Dunne.

Q. Who first talked to you from the Southern Pacific Company about the whistle blowing?

A. Well, a Mr. Aguer, I think his name is, came and got a statement from us.

Q. That was the same day, or the next day after the accident happened? A. Yes.

Q. And then after that whom did you talk to about the whistle blowing?

A. Well, I don't think I talked to anyone. Mr. Brady came and asked us if we would come up for the trial, but he never mentioned anything about the whistling.

Q. Mr. Who did? A. Mr. Brady. [283]

Q. Mr. Brady asked you to come up to San Francisco to be a witness in the trial?

A. Yes.

Q. When did you come up to San Francisco?

A. Tuesday.

Q. Since that time have you discussed your testimony with anyone? A. No.

Q. You have not talked to anyone at all about the whistle?

A. Well, we talked in the lawyer's office Tuesday night. We read over our statements that we had given before.

Q. You went over your statements; you and your mother were together at the time?

A. Yes.

Mr. Myers: I think that is all.

(Testimony of Melvina Disbrow.)

Mr. Dunne: I have no further questions.

The Court: The witnesses may remain in the courtroom, if they wish, or they may be excused.

CLAIRE L. BROWN

called by the defendant, previously sworn.

The Clerk: Mr. Brown, you have been heretofore sworn?

The Witness: Yes.

Direct Examination

Mr. Dunne: Q. Your first name?

A. Claire L. Brown.

Q. Where do you live, Mr. Brown?

A. Beckwith Road.

Q. What is your business?

A. My present business, I am working for the Modesto Irrigation District.

Q. In October of 1945 where were you living at that time? A. On Beckwith Road.

Q. What was your business at that time?

A. Service station.

Q. I want to call your attention particularly to this incident, the incident of a collision at the crossing of Beckwith Road with the Southern Pacific Railroad track on the 11th of October, 1945, an accident in which the Southern Pacific locomotive and an automobile in which were riding certain members of the Souza family, came into collision; did you see that accident? A. Yes.

Q. You were in the service station business at that time? A. Yes. [285]

Q. I want to call your attention to this diagram.

(Testimony of Claire L. Brown.)

This upper diagram, Mr. Brown, this double line that goes right and left across the diagram, and with the red line between is intended to represent the railroad track. It is the same on the lower diagram, but it is a different scale, a larger scale. Then these other lines toward the top of the diagram or the railroad track are intended to represent Highway 99. The two lines and the island in between are there. These lines along here marked "Beckwith Road" are intended to represent a fence and then Beckwith Road itself, the crossing with the railroad track and the intersection with Highway 99. Then beyond that there are a number of devices which are intended to represent buildings. Does that diagram show the gas station?

A. Well, the gas station should be here. I don't know what that is supposed to represent. Almost directly in front here. It should be right there (indicating).

Q. I will put a mark there where you pointed and draw a line out to the side and put a B on that line. I think you may just sit down in the chair again, Mr. Brown.

This is a picture that is introduced here and marked Defendant's Exhibit D. Can you locate in that photograph the gas station? I wonder if you would be good enough to hold that up to point out to the jury where in that picture the gas station is shown.

The Court: Have you identified the exhibit?

Mr. Dunne: Defendant's Exhibit D, your Honor.



(Testimony of Claire L. Brown.)

The Court: All right.

The Witness: A. Here (indicating).

Mr. Dunne: Just to the lefthand side of the picture, a white building?

A. Yes, a white structure.

Q. Mr. Brown, just before this accident happened, where were you?

A. At the time the accident happened, or just before it happened, I was servicing a car in the driveway in the station.

Q. Do you recall whose car that was?

A. It belonged to Tom Stetson.

Q. Where was the car and what were you doing, giving it gas and oil?

A. I had just finished putting in water and walked up to the side of his car. He had stepped out and told me to put gas in and I was moving toward the back of the car. I put the gas in.

Q. Will you tell the jury in your own way what you know about the accident, what you saw and what you heard, not anything that anybody has told you, but your own observation.

Mr. Myers: Pardon me, Your Honor, may I ask the witness to speak up a little more?

The Court: Yes, speak a little louder.

A. Well, as I recall, he got out of the car and told me to put gas in and just as he told me that I had noticed an engine, that [287] is, heard one—

Mr. Myers: Pardon me just a minute. Did he notice it or hear one?

The Court: Speak up.

(Testimony of Claire L. Brown.)

The Witness: I heard the engine, the noise of the engine, and as I recall—I don't recall whether Mr. Stetson said something to me, or just what it was, the engine started tooting, anyway, just as I looked up they struck the car, this car that was coming towards me. That's about all. Mr. Stetson went on over there then and I went in and locked my cash register. That is all I remember.

Mr. Dunne: Q. Now, Mr. Brown, see if you can make that a little more precise for the members of the jury. Can you tell us where down the track, how far off the locomotive was at the time you first saw it? I want to call your attention to something. On the lower of these diagrams the gas station does not show. It has not been marked in. Twenty feet, one inch on this lower diagram is intended to represent 20 feet down on the ground. To indicate what that is, there has been marked off here from the end of the fence down to the Valley Brew sign and that is a distance of 460 feet. Other measurements have been marked on here. The upper diagram is on a different scale. In the upper diagram one inch is equivalent to 100 feet on the ground. I want you to indicate to the jury as best you can where the locomotive was when you first saw it, either by telling [288] them or relating it to some object on the ground by estimate or distance, or if you can, by marking it. Anyway you want to indicate to the jury where the locomotive was.

A. Well, possibly—possibly between 50 and 100 feet, as near as I can recall.

(Testimony of Claire L. Brown.)

Mr. Myers: I am sorry, your Honor, I just can't hear the witness.

Mr. Dunne: "Possibly 50 to 100 feet, as near as I can recall."

Q. Where, Mr. Brown, was the automobile when you first saw it?

A. Just approaching the track. I wouldn't know how far it was because I was looking around the pump to see.

Q. One other thing. Did you see the car long enough, the automobile, I mean, long enough to form an estimate of its speed? A. I did not.

Q. Did you form any estimate of the speed of the locomotive?

A. I believe at the time I did think it was possibly going around 40 miles an hour, the locomotive.

Q. That was an estimate that you made at the time? A. That was it.

Q. What kind of weather was it that morning, Mr. Brown? A. As I recall, it was clear.

Mr. Dunne: I have no further questions. [289]

#### Cross-Examination

Mr. Myers: Q. Mr. Brown, you are now employed, you say, by the Irrigation District in Modesto? A. Yes.

Q. Is all of this territory that is shown here in the region of Beckwith Road on both sides of the right-of-way land that comes within that Irrigation District?

A. Well, no. Well, yes, it comes into the District.

(Testimony of Claire L. Brown.)

It doesn't come in my territory but it is in the District.

Q. It is all land where they raise alfalfa and have dairy ranches and that sort of thing where they irrigate a number of times a year?

A. Yes.

Q. And where they raise four or five crops of alfalfa and that sort of thing a year?

A. Yes.

Q. Is that right? A. Yes.

Q. When did you go to work for the Irrigation Company? A. The first of July.

Q. Of this last year? A. Yes.

Q. Now, Mr. Brown, coming back to this accident that happened on October 11, 1945; at that time you were operating this service station you have described, is that correct? [290]

A. Yes.

Q. Let me ask you: Isn't it true that you were servicing or about to service a car of a customer that had driven into the service station when the accident happened? A. Yes.

Q. And you had turned and were facing south down Highway 99 when you heard the engine whistle and in the middle of one of the whistles you heard the crash and then you went on; isn't that true? A. No.

Q. What is that?

A. I turned—I saw the crash just as it crashed, I saw it.

Q. How far was the automobile from the tracks, sir?

(Testimony of Claire L. Brown.)

A. It was right at the tracks, just as the crash struck it.

Q. It was on the track? A. Yes.

Q. So you don't know a distance 20 feet west of the track whether it had come to a stop or what had happened?

A. I don't know whether he stopped or not, no.

Q. Isn't it a fact, sir, that you did not see the engine involved in this accident until you heard the crash and then saw it proceeding in a northerly direction, north of Beckwith Road at a fast rate of speed?

A. Well, I think—I don't know. I saw the locomotive just before it struck the car. [291]

Q. Well, let me ask you this, Mr. Brown: Did anyone talk to you about the accident after the accident happened? A. Yes, sir.

Q. Who came to see you first about it?

A. I don't recall the man's name; he was a railroad investigator, I know.

Q. Mr. Aguer? A. That's right.

Q. He took a statement from you?

A. Yes.

Q. Was that on the day of the accident?

A. That was on the evening of the accident.

Q. Who was the next man who called to see you? Let me suggest this: Did a man by the name of Mr. Griek call to see you?

A. What was that name?

Q. Glenn Griek. A. Not that I recall.

Q. From the Hilton Agency in Modesto?



(Testimony of Claire L. Brown.)

A. Not that I recall. It is possible.

Q. You don't know, then, whether you talked to somebody else about the accident at your place of business or not?

A. Frankly, there was an accident later and I am confused whether it was someone talked to me on that accident or on this one, but there was in one or the other of those cases someone who talked to me. [292]

Q. After that did you talk to anyone about this accident until you came to San Francisco to testify?

A. No more than to just gossip, I suppose you would call it.

Q. I mean did you talk to anyone connected with the Southern Pacific Company about it?

A. Yes.

Q. When was that?

A. When did I talk to them?

Q. Yes.

A. I believe I talked to Mr. Dunne. I don't recall just when it was.

Q. Did you talk to Mr. Brady or any other gentleman from the Southern Pacific?

A. Mr. Brady was at my house one time, yes.

Q. As far as you know, has your version of this accident been the same all the time from the time Mr. Aguer first talked to you; is that right?

A. Yes.

Q. Mr. Brown, would you call these whistles that you heard in your own language sort of "spur-of-the-moment whistles"? A. Yes.

Q. Mr. Brown, I show you a document here of

(Testimony of Claire L. Brown.)

three pages and ask you if at the bottom of the first page, is that your signature?

A. It looks very much like it.

Q. I show you a word stricken out here and the initials "C. B." [293] Are those your initials?

A. Right.

Q. I show you page 2 and ask you if that is your signature? A. Yes.

Q. And is this your signature at the—

A. Yes.

Q. —top of the last page? That is your signature, sir?

A. Yes. You say the top of the last page?

Q. Well, toward the top. It is about one-third of the distance. Do you recall that this statement was taken from you on the first day of November, 1945, by a man by the name of Glenn Griek?

A. Well, it is possible. I don't remember the man at all. I do, as I say, in one of the cases I know there was a second man came to see me and took a statement some time later. I don't recall—

The Court: You remember giving the statement, signing it?

A. I remember I signed it. Apparently I signed it, yes.

Mr. Myers: I offer that in evidence, your Honor, as Plaintiff's exhibit next in order.

The Court: It will be received.

(Statement of Claire Brown was marked Plaintiff's Exhibit No. 12 in evidence.)

(Testimony of Claire L. Brown.)

Mr. Myers: If I may read the statement—I am through with the witness. [294]

The Court: If you are finished with the witness, you may read it. Any redirect?

Mr. Dunne: No redirect.

The Court: Step down. You may read the statement.

Mr. Myers: (Reading) “Modesto, California, November 1, 1945.

“I am Mr. C. L. Brown, owner of the Woodbridge service station at the intersection of the No. 99 Highway, and Beckwith Road. My service station is on the east side of the No. 99 Highway directly across from the Beckwith Road and the Southern Pacific Railroad crossing. I have been at my present location since May, 1945. Referring to an accident that took place on the 11th of October, 1945, about 9:15 a.m. at the Beckwith Road and the Southern Pacific Railroad crossing; the Southern Pacific Railroad runs north and south at this point between Modesto, and Salida, Calif.; Beckwith Road at this point runs approximately east and west, terminating at the No. 99 Highway which runs parallel to the Southern Pacific Railroad, about 30 feet east of the railroad tracks; between a lone engine, and a grey Ford coupe, I state. I was working at the gasoline pumps in front of my service station on the above mentioned date, and at the above mentioned time, taking an order from a customer who had just driven in to my station. I wasn't looking at the railroad tracks, but was facing about south. I hear a [295] train

(Testimony of Claire L. Brown.)

whistle two or three short little toots. These toots were not the regular blasts that the passenger trains usually give, but were kind of a "spur of the moment" toots. Following the toots, to be almost simultaneous with the toots came a crash. There couldn't have been more than a few seconds between the toots and the crash. I turned around at the sound of the crash. I saw a large piece of what looked to be a turtle back of a car flying through the air. The engine, after the collision, went on down the tracks to the north. I immediately called the Highway Patrol and notified them of the accident. They said they would send an ambulance out to the scene immediately. After I had completed my call to the Highway Patrol I went back out to the front of my station and filled my customer's car with gasoline. By the time I had finished filling my customer's car, the engine had backed up to the scene of the accident. There is no way I could estimate the speed of the engine, as I wasn't looking at it long enough to make an estimate. The engine was going too fast to stop immediately, however. I then went over to the scene of the accident and noted three men lying on the ground on the north side of Beckwith Road. I stayed at the scene about five minutes. During the time I was at the scene I saw that one man was dead, and one was injured very badly. This one man was groaning badly. The other man was conscious, but looked rather [296] dazed. I then left the scene of the accident.

(Testimony of Claire L. Brown.)

“I have read the above statement of three pages, and I believe it to be true and correct to the best of my knowledge.

“(Signed) Clair L. Brown.” [296-a]

E. T. STETSON,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. E. T. Stetson.

Direct Examination

Mr. Dunne: Q. Mr. Stetson, where do you live?

A. Out four miles north of Modesto.

Q. In October, 1945, were you living at the same place? A. Yes, I was.

Q. Mr. Stetson, what is your business and what was it in October of 1945?

A. I have been in the same business for seven years, a McNess Route.

Q. A McNess Route?

A. A McNess Route.

Q. Will you tell the members of the jury what a McNess Route is?

A. I am a dealer for the McNess Company, who supply the farmers with household supplies, veterinary supplies, brooms and brushes.

Q. What do you mean by a route? Do you have a supply of goods that you take around with you?

A. I have a supply of goods in my practice and I go from farm to farm and sell the farmer what he requires.

Q. In October, 1945, just in a general way what was the location [297] of your route?



(Testimony of E. T. Stetson.)

A. Well, I went from the town of Salida to the town of Keyes, and up and down 99, and I go from the Stanislaus River to the Tuolumne River. I cover about—well, I cover a radius from the house of 15 miles each way.

The Court: Q. Do you make that trip every day?

A. I make one route a month. I make a trip every day, but I cover—Route No. 1 I cover every 30 days.

Mr. Dunne: Q. Did you witness an accident, a collision, at the crossing of Beckwith Road and the Southern Pacific tracks on the 11th of October, 1945, a collision between a locomotive and an automobile, in which were riding some members of the Souza family? A. Yes, I did.

Q. Where were you at the time of that accident?

A. I was across the east side of the highway getting gas to put in my car at the service station.

Q. Where had you come from?

A. I had come three and a half miles east from 99, where my home is. It is about three and a half miles east of 99 Highway straight across the country.

Q. Where did you hit 99?

A. It comes in on Dale Road, and then down 99 just below the service station.

Q. Mr. Stetson, this diagram up here, the top diagram, No. [298] 1, is drawn to a scale on which 1 inch on the diagram is intended to represent 100 feet on the ground. This line down along

(Testimony of E. T. Stetson.)

here is intended to represent Dale Road, this parallel lines. These lines along here are intended to represent the two sections of 99 with the island in between, and these buildings up in through here are intended to represent buildings that are about opposite the Beckwith Road crossing. As I understand, you had come then down Dale Road?

A. Over this road to Walnut Avenue.

Q. Into Dale Road?

A. Into Dale Road, and down Dale Road to 99, and up 99 to the service station which is directly across from Beckwith.

Q. Tell us after you drove into the service station what occurred there? What were you doing? Who was there, so the jury may know what was going on.

A. We were out of gas in the Model T Ford—that is not a truck, that is a sedan—and so my wife and I went over to get gas put into it, and so we drove over to Brownie's Service Station there to get gas. My wife went on into Woodbridge's Store to buy some groceries, and I was having Brownie service my car, and I was standing there on the 99 side, facing 99, the pump, the gasoline pumps. Brownie was putting gasoline in the car. As I was standing there I noticed this engine coming up the track, because it was coming with a rattle. The wheel plunger, or whatever it is that runs the engine on the wheels there was [299] rattling, so I was kind of surprised. It wasn't pulling a train coming up there, and I looked closely at the engine, and as the engine got up to what I saw was the

(Testimony of E. T. Stetson.)

signboard there, there was a signboard on the side of the railroad track, there, when the engine got to about that sign, I heard the bell ringing, and the engine kept on coming. I would state about 30 miles an hour in my estimation of it, and I also looked down the Beckwith Road. I could see down the Beckwith Road from where I was standing, because I was looking directly at the Beckwith Road, and I seen a car coming. A car came up close to the railroad. It didn't seem to shut off its speed. It kept coming at about 25 miles an hour. I said to Brownie—

Mr. Myers: Just a moment, your Honor.

Mr. Dunne: It is part of the *res gestae*.

The Court: No, what he said to Brownie isn't proper. Strike that. Just say what you saw.

The Witness: I saw the car coming, and I remarked—

The Court: No, don't say what you remarked.

The Witness: I saw the car coming, and the car kept on coming right across the tracks, and at that time the engine had struck the car on the rear end, right by the back wheel, and, of course, I saw the door fly off across the highway from the opposite side, and it hit the cross arm, the post alongside the railroad with the cross arm on it. Then we rushed [300] over there and we started taking people out of the car. The engine had stopped up the track, about, I would say, 300 feet beyond Beckwith north. The engineer and the fireman came back, and we laid these people out on the ground, there.

(Testimony of E. T. Stetson.)

Mr. Dunne: Q. What was the weather that morning, Mr. Stetson?

A. Well, it couldn't have been anything but a clear day—

Mr. Myers: Just a minute, your Honor.

The Court: Strike that out. We do not go by what couldn't have been. They seem to have unusual weather around Modesto now, anyway, so you had better tell us what it was.

The Witness: At that time of the year it was a bright, clear day. There was no obstruction to my driving.

Mr. Dunne: Q. One other thing. Are you able to tell us anything about a whistle on the locomotive, whether it was or was not sounded, or do you know?

A. I couldn't say whether it was blowing or whether it wasn't. It could have been blowing or wasn't blowing. That didn't attract my attention, at all. The whistle, it could have been blown or might not have been.

The Court: Q. What attracted your attention?

A. The bell on the engine and the rattling of the wheels on the engine.

Q. You said something about the driver hesitated. Did you mean to say the driver hesitated, or did you first say he didn't seem [301] to—

A. He didn't seem to hesitate. He came at this 25 miles an hour speed, I would say, and kept right straight across the track.

The Court: All right.

(Testimony of E. T. Stetson.)

Mr. Dunne: I have no further questions.

The Court: Cross-examine.

Mr. Myers: Your Honor, this is going to take some time. It is 3:20. I was responsible for holding the jury pretty late at lunch time.

The Court: That is not your responsibility. I held the jury. Let us go on and finish. I can't see why this should take a long time. At any rate, I will take the responsibility. I will declare a recess later on. The jurors are informed I am the only one who looks at the clock, so far as the hours are concerned, and the recess, I control them and not counsel; in fact, I am offended if a lawyer looks at the clock and tells me what time it is, because I am supposed to be in charge of this Court and not him. We have just so much work to do. If you want a recess—

Mr. Myers: Yes, I want a recess.

The Court: That is a different proposition. Don't put it on another ground. Put it on your own ground.

Mr. Myers: Your Honor, if I try to take the blame for it I am still wrong.

The Court: All right. We will take a short recess.

(Recess.) [302]

The Court: Proceed.

#### Cross-Examination

Mr. Myers: Q. Mr. Stetson, you had driven your automobile into the service station to get



(Testimony of E. T. Stetson.)

some gasoline, you say, prior to the time that this accident happened; is that right?

A. That is correct.

Q. Was Mr. Brown the man waiting on you?

A. Yes.

Q. What direction was your automobile facing as you drove in?

A. I was facing north, parallel to 99, toward Salida.

Q. You were facing toward Salida?

A. Yes.

Q. It was a Model T Ford?

A. No, a sedan. Four-door sedan, 1937.

Q. The gas tank was on the back end of it?

A. Yes. It comes up through the fender.

Q. What?

A. The spout comes up through the back fender.

Q. So that when Mr. Brown was putting some gasoline in your automobile there was no occasion for you to get out of the car, was there?

A. No, but I always did step out of the car because I am so used to stepping out of the front when I stop. I generally step out of a car as well. I am just familiar with that practice.

Q. What I meant was this gas tank wasn't under the driver's [303] seat so you had to get out.

A. No.

Q. When you stepped out of your automobile were you looking at Mr. Brown or which direction were you looking?

A. I was looking down 99. I was looking south on 99.

(Testimony of E. T. Stetson.)

Q. Same direction Mr. Brown was facing?

A. No.

Q. What?

A. Brown was working on my car. We will say the gas pump, two gas pumps are here, my car was in here on the inside lane of gas pumps and I was standing here, facing down south on 99.

Q. Facing back—in other words, that way (indicating). A. Facing that way on 99.

Q. And Mr. Brown was facing in what direction? A. He was filling the gas tank.

Q. On what side, the side you were on?

A. No. He was inside the pumps, filling the gas tank from the south pump.

Q. Your attention was first attracted by what?

A. By the rattle of wheels on the train, the engine.

Q. You mean the rattle of the wheels on the engine? A. Yes.

Q. When you heard that rattling of the wheels, what did you do?

A. I looked toward the engine.

Q. When you looked toward the engine, whereabouts was it? [304]

A. Well, the only landmark I know of there I remember distinctly was that signboard which sets on the west side of the track; it was below that.

Q. You mean this Valley Brew signboard?

A. Yes, that is the one.

Q. That, I believe the engineer said, was 460

(Testimony of E. T. Stetson.)

feet from the Beckwith Road. I believe that is correct.

Mr. Dunne: From the end of the fence. I marked it there.

Mr. Myers: Yes, 460 feet. You say he was below that signboard?

A. Yes, below that signboard when I saw him.

Q. How far below that?

A. I couldn't say exactly. I could still see the signboard, the color yellow, or whatever color it is, I could see the signboard and I could see the engine coming.

Q. You were over here somewhere?

A. Right straight across Beckwith Road.

Q. That comes in through here in this lower diagram.

A. Yes.

Q. So you are over here some place?

A. I was right here (indicating).

Q. Below this scale here?

A. I was over in here because I looked right down Beckwith Road.

Q. Put an X there where you think you were.

A. I would say here.

Q. All right. We will label that, with your Honor's permission, as S-1, being the position of Mr. Stetson when he first heard the engine and saw it, that was below the Valley Brew signboard. About how far below it would you say it was?

A. Well, it is pretty hard to guess in feet. I would say it was a distance of a block, anyhow, below the signboard.

(Testimony of E. T. Stetson.)

Q. In other words, the engine was 250 feet further on, further south of the signboard?

A. About a block below the signboard.

Q. You say about a block; about 250 feet?

A. Yes.

Q. So we have 250 feet more and that is your engine which was westbound, or southbound, whether you are a railroad man or whether you are a layman; is that right?

A. Yes. It was coming from the south.

Q. When you saw the engine generally there in that locality, did you keep on looking at it?

A. Yes, because the rattling of the wheels called my attention to it and it was coming at a slow rate of speed to my notion. That is what drew my attention, the rattling.

Q. How long did you continue to watch that engine? A. Well, clear until it hit.

Q. You continued to watch the engine until it hit this car at the crossing? [306] A. Yes.

Q. You were watching the engine all the time, Mr. Stetson? A. Yes.

Q. Did you see the automobile before the accident happened?

A. Well, I would like to restate that. I looked at the engine, then I looked up Beckwith Road.

Q. In other words, you did not have your eyes on the engine all the time.

A. I did until it passed that Valley Brew sign.

Q. Is it fair to say the engine, then, was past, just west of the Valley Brew sign then when you took your eyes off it the first time?

(Testimony of E. T. Stetson.)

A. It was south of the Valley Brew sign and then it was north of the Valley Brew sign when I took my eyes off.

Q. How much north of the Valley Brew sign?

A. I would say 100 feet north.

Q. 100 feet. So if that represents 100 feet, about in here is where the engine was when you took your eyes off of it; is that right?

A. Yes; just for the moment.

Q. Just for the moment. In other words, you momentarily took your eyes off it. A. Yes.

Q. We will label that S-2 as the position of the engine when the witness looked away from it the first time. [307]

When you looked away from the engine when it was in that position, whereabouts did you look?

A. I looked down Beckwith Road and I seen a car coming.

Q. You saw a car coming where on Beckwith Road?

A. Well, it was down the road, I couldn't exactly state how many feet it was.

Q. Well, about how far would you say, your best estimate?

A. Well, it must have been two or three hundred feet, I would say. I don't know exactly.

Q. Two or three hundred feet from where, from where you stood?

A. From the railroad track.

Q. From the railroad track.

A. Yes, down Beckwith Road.

Q. So the car was somewhere in the position



(Testimony of E. T. Stetson.)

we will label S-3 when you first saw it; is that correct?      A. Yes.

Q. And 300 feet from the railroad track. Then did you continue to watch the car?

A. Well, my eyes glanced from the engine to the car because I was afraid—the engine was making the crossing and I fear that crossing myself very much. I always stop there before I ever cross the track.

Q. What were you afraid of when you saw the automobile 300 feet west of the track at that time and the engine was back from the crossing approximately 360 feet—whatever it may have been? [308]

A. Well, it happened very quickly, as you know, and I said to Brownie—

Q. Never mind that. What was it?

A. Well, it came in to my mind, Is that car going to stop at the railroad crossing or is it going to run in front of the engine? That is what came into my mind.

Q. Was that because the engine was not making any noise and was drifting along there as a light engine at the time, is that the thing that caused the apprehension in your mind?

A. Well, no, because I am afraid of the crossing, most of the crossings. I cross that every month regular and I am afraid of the crossing there; any crossing, in fact.

Q. What?

A. Any crossing, I generally always watch them carefully.

Q. In any event, your mind was filled with ap-

(Testimony of E. T. Stetson.)

prehension when you saw the engine back there and you could see the car down here on Beckwith Road.

A. Yes.

Q. So feeling that way about it, you continued to watch the vehicle, or both of them; what was the situation?

A. Well, I watched both of them, I suppose pretty close until—

Q. You are looking now—we have you looking down here at the automobile on Beckwith Road 300 feet west of the railroad track.

Mr. Dunne: Counsel has repeatedly said 300 feet. The [309] witness' testimony was two or three hundred feet.

Mr. Myers: Well, all right. Then I will correct it. I certainly don't want to misquote the witness.

Q. What is it, Mr. Stetson? It was approximately 300 feet, was it?

A. It is pretty hard to judge being on the ground and standing there and looking down any road. To my knowledge, the distance it was, it was between two and three hundred feet.

Q. Between two and three hundred.

A. Yes.

Q. There were grape vines growing on the south side of Beckwith Road?

A. Yes, there is.

Q. How far back from the railroad track do those grape vines extend?

A. Well, to my recollection, it extends quite a way back from the road. There is another ranch there and it goes in the side of the road there.

(Testimony of E. T. Stetson.)

Q. Where was this automobile with reference to the westerly end of this grape vine?

A. I couldn't say.

Q. Where was it with reference to the easterly end of the grape vines?

A. I couldn't say because I never took that as a land site there. I never noticed the grape vines.

Q. All right. We will put you down around the care, down here, from this distance and incorporate this with S-3 and call that S-4 to show that the car was somewhere in that area at the time you first saw it. How long did you watch it?

A. Well, my eyes didn't stay continuously on it. In other words, I watched it come and I turned again to the engine. I seen them both.

Q. Is it your testimony that as you stood here that you watched both the engine and the car as it traveled up to the intersection?

A. No. I say I glanced at the engine because I heard the bell ringing past the sign there, I heard the bell ringing there and I thought in my mind he would hear the bell.

Q. You heard the bell ringing but you did not hear any whistle blowing?

A. I never heard a whistle blowing at all.

Q. Is it fair to say, in your opinion, no whistle was blown on the engine?

A. I wouldn't say there was because I don't know whether it blew or did not blow.

Q. Well, if a whistle had of blown you would have heard it, would you not?

A. No, not necessarily. The valley is so open

(Testimony of E. T. Stetson.)

there you don't always hear the whistle at the crossings.

Q. Is it your testimony you could hear a bell where you could [311] not hear a whistle?

A. No, you couldn't overhear a bell on a whistle but you could hear the bell and I remember the ping of the bell ringing after it passed the sign.

Q. You don't recall hearing the whistle at any time?

A. No.

Q. When you watched this automobile there proceeding up toward the crossing, where did your eyes leave it to look back at the engine, where was that?

A. I couldn't say exactly where it was.

Q. What is your estimate?

A. In the excitement I was watching both of them and thinking if that fellow didn't stop the engine would hit him.

Q. Is it your testimony that in your own mind there was excitement when the engine was approximately 360 feet back of that Beckwith Road and they were two or three hundred feet from the crossing?

A. No, I don't think there was any excitement at all.

Q. What did you mean when you said "in the excitement" that you were unable to—

A. I mean in my mind, I was looking at both articles, my excitement. What I meant by that was my mind getting excited if that fellow didn't stop at the crossing. I travel that road every month and I stop at the railroad crossing and I know—I

(Testimony of E. T. Stetson.)

drive a panel-body truck and I can't see only out of the door, [312] the glass.

Q. Mr. Stetson, isn't this the situation, that as to the distance the engine was from Beckwith Road and as to the distance the automobile was from the crossing when you saw him, it was all a matter of reconstruction as you reconstructed it after the accident happened.

A. No, it was not, because I seen them before it happened.

Q. Then we will come back to the automobile. You saw the automobile proceeding in an easterly direction on Beckwith Road? A. Yes.

Q. I want to know, sir, what point it had reached when you looked back to the engine again.

A. I couldn't say. I seen both of them and I didn't think the distance there would be—

Q. What is your estimate as to the relative position on Beckwith Road when your eyes left it and you looked back to the engine?

A. I couldn't say. Two moving objects there; I couldn't say the difference between the two of them.

Q. Well, which one was moving the fastest, the engine or the automobile?

A. The engine was moving faster.

Q. How much faster?

A. Well, about 10 miles faster.

Q. Ten miles faster. What is your estimate of the speed of the engine? [313]

Q. About ten miles faster, and what is your estimate of the speed of the engine?



(Testimony of E. T. Stetson.)

A. Well, I couldn't say exactly, but I think between 20 and 30 miles an hour.

Q. The engine was going between 20 and 30 miles an hour, and where was the engine when you formed that estimate?

A. Well, when I first seen it coming along by the signboard, when I formed the estimate how slow it was going, because that is what drew my attention, the slowness of the engine. I could hear the rattling of it.

Q. So it was the slowness of the engine over 460 feet plus 250 feet from Beckwith Road that caused you to watch it, is that right?

A. To look toward the engine, that is correct.

Q. That caused you to have some apprehension in your own mind that there was going to be an accident?

A. No, not when I looked at the engine. I didn't think anything of an accident until I saw the car down Beckwith and the engine keep on coming, and then I wondered if that fellow was going to stop at the railroad crossing, because I figured they were both moving toward that crossing.

Q. Did you watch the automobile driven by Mr. Souza all the time it proceeded up Beckwith Road to the crossing?

A. I can't say I didn't take my eyes off of it. I remember seeing them both coming right along. I seen the automobile [314] come up that quick, and the engine come up the track.

Q. Did you ever form any estimate as to the speed of the automobile?

(Testimony of E. T. Stetson.)

A. No, just went on in my mind about 25 miles an hour.

Q. That is what went on in your mind, about 25 miles an hour?

A. Because it wasn't coming very fast.

Q. So just once more, then, I will ask you when you saw this automobile on Beckwith Road going 25 miles an hour, and this engine back on the right-of-way going 20 to 30 miles an hour, and the engine was approximately 600 to 710 feet from the Beckwith Road, and the automobile was from two to three hundred feet from the crossing, your mind was filled with apprehension as to what was going to happen to this automobile and the engine, is that right?

A. Yes, because I seen wrecks before.

Q. You kept your eyes then focused on both of them, the engine with its bell ringing, until the moment of impact, is that right? Did you stay standing in the same spot at the end of your car all the time that this was going on?

A. I was standing directly opposite the car.

Q. Your car?

A. Right opposite the middle of the car, between the pumps. I came out between the pumps and I stood on the outside.

Q. Did you stand there all the time?

A. I was standing there smoking all the time.

Q. Standing there smoking by the gasoline pumps all the time, is that right?

A. When I got out of the car I talked to

(Testimony of E. T. Stetson.)

Brownie, told him how much gas I wanted, and then I lit a smoke, and I stood there, and the noise of this engine drew my attention to the tracks.

Q. What was the noise of the engine that you heard?

A. Well, if you ever heard an engine coming up the track, you will hear the wheels rattle or the arm—I don't know which makes that noise, but it is a rattling of the wheels, like.

Q. Kind of a side rod pound?

A. Yes, the plunger pounding like. An engine generally goes pretty slow when it makes that type of noise.

Q. Was this engine smoking?

A. No, it was not.

Q. Was it steaming?

A. Well, there was a slight gray steam coming from the stack.

Q. Isn't it a fact that this engine was what they call drifting, it wasn't making any noise at all? It was running very silently as it came down to the intersection?

A. No, it was making enough noise to draw my attention to it.

Q. There wasn't anything else, a whistle or bell, that drew it to your attention?

A. No, I heard the bell but I didn't hear the whistle.

Q. You heard no whistle?

A. No whistle, at all. It could have been blown. I don't know. [316]

(Testimony of E. T. Stetson.)

Q. How far after the impact did the engine go before it stopped?

A. Well, there was a canal bridge above the road. It was this side of the canal bridge. I don't know how many feet that is.

Q. It could have been a thousand feet?

A. I wouldn't say. I don't know. But there is a canal bridge up there, and the engine stopped, seemed to stop as quickly as possible, and it was up that way because the engineer—I remember the engine stopping up there before I got across the highway. You see, it is a double lane highway, and before I got clear across the second lane of the highway I seen the engineer and the fireman coming back towards the accident.

Q. They did not back their engine back to the scene of the accident?

A. No, they didn't. They stopped it up there.

Q. They left their engine sitting back up the track?

A. And both of them came down the track.

Q. And they never did back it to the scene of the accident?

A. Never backed it up.

Q. Are you positive of that?

A. I am absolutely positive of that, because I got a remembrance of that, a memory that the engine blew off its pop valve and the engineer said to the fireman—

Q. Now, just a minute. No conversations.

A. Well, he made a motion to the fireman to go and shut the pop valve off, or turn down the

(Testimony of E. T. Stetson.)

steam, whatever they do. I [317] heard it blow off. You know how it blows when them pop valves go off.

Q. Was there anyone else on this engine besides the fireman and the engineer?

A. I never seen anybody only the engineer and fireman.

Q. Just the engineer and fireman?

A. That is all I saw.

Q. In your best judgment that is all there were, the engineer and the fireman?

A. That is all I know of.

Q. That is all you saw around the scene of the accident?

A. That is all I saw there, the engineer and the fireman.

Q. How long did you remain at the scene of the accident?

A. Just a minute. You asked me a question. I seen a doctor there at the scene of the accident, because when I ran across there to help to take them out of the car, one fellow said, "Don't touch them. Leave them alone." And I said, "No, they will smother in there. We have to get them out of there," and with the help of the others we got them out on the ground there, and at that time there was a doctor—I remember he had a brown suit and a gray hat. He came up and started to look over the people that was in the accident, and he said—he pronounced what had happened to them. One was hurt internally, and one was dead,



(Testimony of E. T. Stetson.)

and the other one wasn't hurt internally. [318]

Q. How long did you remain at the scene of the accident?

A. Well, I went back across the road and the ambulance came. I was across the road at Brownie's Service Station when the ambulance came up there.

Q. Were you there when Mr. Woodbridge brought Mrs. Souza back to the scene of the accident?

A. Yes, I was there when he brought them back.

Q. And Mrs. Souza was there?

A. Well, there was a crowd around there and I didn't go back over again.

Q. You saw Mrs. Souza there, didn't you?

A. No, I didn't see Mrs. Souza there, but I heard her crying across the track, there. I was back at Brownie's Service Station. and Brownie said, "That must be the Souza family."

Q. Mr. Souza was still laying there, was he not?

A. Mr. Souza—yes, right where we laid him. We laid him right on the side of the highway there.

Q. The ambulance came to the scene of the accident and had gone before you ever left, is that right?

A. Before I left, yes, that is right.

Q. Now, Mr. Stetson, when did the engine leave?

A. Well, I don't remember that at all, when it left.

Q. You have no memory at all when the engine left?

(Testimony of E. T. Stetson.)

A. No, I don't remember when it went away from there, at all.

Q. When it left did it pull away from the scene of the accident [319] or did it pull away from down the right-of-way a thousand feet or so?

A. The last I remember it was still standing where he stopped it, down the tracks. I don't remember when it left, at all. I don't remember that.

Q. You do not remember ever seeing it?

A. Not leave, no.

Q. Did you ever discuss this case with anyone at all before coming here to testify today?

A. No, I tried to get out of being a witness and so I never gave my name in as a witness, because I know these cases take a lot of time and everything, and I am pretty busy in my business, and so I try to keep away from being a witness if other people can do it.

Q. Do you know how your name was obtained as a witness?

A. No, I don't know.

Q. Who first contacted you?

A. Mr. Brady came over to my house about three weeks ago, and that was the first I knew anything about it, and I didn't know what he came for. He said he was from the S. P.

I said, "I don't ship by the S. P. I ship by the Valley Express. They broke too many bottles for me. I used to ship S. P., P.M.T."

Q. You got mad at them and quit shipping?

A. No, I didn't get mad at them, but I just changed over to [320] the Valley Express, because

(Testimony of E. T. Stetson.)

during the war they had less breakage. They had a lot of green help in the freight depot at Modesto and it seemed like we had a lot of breakage, and, of course, that throws our stock out of balance. When we order our stock we expect to get our stuff.

Q. You did not discuss this accident with anyone, the details, as to the whistle, the bell, or anything else, or as to what you had seen on this morning that the accident occurred, until Mr. Brady came to see you about three weeks ago, is that right?

A. Yes, sir, outside of saying to Brownie, talking over with him how that accident happened, or something of that sort. We might have said that was a terrible thing to have happened there, and so on.

Q. You might have talked with Mr. Brownie, but what I mean is, as far as the Southern Pacific Company is concerned, or anyone connected with this case, the only discussion you had was about three weeks ago, and that was the first time in over two years and a half from the time of the happening of the accident?

A. That is the idea.

Q. And at that time, then, you tried to think back and did think back and told Mr. Brady what you observed on the morning that this accident happened, is that right?

A. Yes, sir, that is right.

Mr. Myers: All right. That is all. [321]

Mr. Dunne: That is all. The defendant rests.

(Defendant rests.)

The Court: Any rebuttal?

The Witness: Do you want me, your Honor?

The Court: No, you may step down.

The Court: Any rebuttal?

Mr. Myers: I do not think so, your Honor, but will you give me about two minutes here?

Your Honor, the plaintiff rests.

(Plaintiff rests.)

The Court: Ladies and gentlemen of the jury, there are some matters which must be taken up by counsel and the court prior to the beginning of the argument. It is late in the afternoon. We won't begin the argument at the present time. However, we have discussed the matter, and in order to give counsel full opportunity to present the argument, and in order to give the court the opportunity to read the instructions, which, because of the fact that we are trying three cases together, must be more elaborate than usual, we have decided to call you back earlier so that the presentation of the arguments and the reading of the instructions will not be broken up. Of course, from the moment I begin the reading of the instructions you cannot separate any more, and then you begin your deliberations right after, and, of course, after you begin your deliberations you cannot separate, [322] and if you go to lunch you will be taken to lunch together and so on in that manner until you have brought in your verdict. I am simply explaining that to you so you will understand why I am bringing you out so early an hour, because if we bring you back at ten o'clock,

I am sure counsel will have concluded the argument, but it will not be possible for the court to conclude the reading of the instructions by the lunch hour, and then after the argument of counsel we take the usual recess, then by the time I have read the instructions, which will probably take a half hour, we are in the middle of the afternoon, and I do not want you to have your eyes on the clock and be worrying about your transportation. If I send you out at an early hour then the responsibility is yours. If I send you out at a late hour, the responsibility is mine, when it comes to the time that you take to deliberate. So in order to arrange those things we have decided upon nine o'clock as a time for convening tomorrow. I am going to ask if that hour will inconvenience any of you who have a long way to come. Is that hour satisfactory? Everybody seems to agree on that.

Before we separate, and because this is the conclusion of the taking of testimony, I want to make an observation for the benefit of those of you who are not conversant with the technique in the Federal courts. It is the custom in Federal courts for the judge to propound questions to witnesses [323] if in his opinion he believes that a certain matter should be brought out at the time. Many of the State judges do the same thing. Some judges do not. I was a State judge before I became a Federal judge, and my technique was the same. Wherever I believed that a certain question should be asked in order to bring something out, I did it. However, I want to warn you that while it is the right, as I shall instruct you more fully tomorrow, of a judge



of this court, unlike that of the judge of a State court, to comment on the facts, I do not choose to comment on the facts and shall not exercise that right in this case. I think I so stated to you when you were examined concerning your qualifications to act as jurors in the case. Nor are you to infer from the questions that I may have asked, or from any exchanges between counsel and the court, that I have any view as to any of the facts in this case, whether they relate to the location of the place, to the geography of the place, to the weather, or to anything else. You are not to infer that because I asked a question, or while I was discussing the matter with counsel I said I had some familiarity with the country, having lived there, that I intended to convey any idea as to the facts which took place on that particular morning. That relates to anything I may have said in talking to counsel and in regard to the questions. I did not ask very many questions of the witnesses. I did ask some. My object was to bring out in greater detail certain facts [324] not yet fully testified to by the particular witnesses. You are not to infer from the questions I asked that I have any opinion as to the facts to which the questions relate. If from those questions you have made the inference that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as an opinion, but you are at liberty to disregard in arriving at your own conclusions as to the particular facts, or as to the other facts in the case, such opinion. I thought I would give you this instruction at the present time. At the conclusion of the testimony I shall instruct you

more fully as to my province and your province when you return tomorrow after counsel have concluded the arguments in the case.

You are about to withdraw from the courtroom. The court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express an opinion thereon until the cause is finally submitted to you. Remember the admonition I have heretofore given to you, not to form any definite conclusion as to any fact until the cause is submitted to you after the arguments of counsel.

Before we withdraw, is there any other statement as to any particular incident, or any discussion between counsel and the court that you feel I should refer to for the guidance of the jury, lest they may have misunderstood anything I may have said? I would be very glad to refer to anything in particular. [325] Frankly, I am not conscious that I participated very much in the questioning in this particular case, but because this is a new panel I want to make certain that they did not draw any inferences one way or the other from the slight participation I have had on the questioning in this particular case. Mr. Dnne?

Mr. Dunne: No, your Honor.

The Court: Mr. Myers?

Mr. Myers: No, your Honor.

The Court: All right, ladies and gentlemen, you may withdraw from the courtroom.

(Thereupon the jurors retired from the courtroom and in their absence the following occurred:)

The Court: Let the record show that the jury has withdrawn and that the present proceedings are had outside of their presence.

Mr. Dunne: If your Honor please, with respect to each claim or cause of action and what was originally before consolidation as to each case, we respectfully move the court to direct a verdict in favor of the defendant, the Southern Pacific Company. We make the motion separately and severally as to each case and each claim, first upon the ground that there was no substantial evidence, and on the further ground that there is no evidence sufficient to sustain a finding of any negligence on the part of the defendant, [326] Southern Pacific Company, in the only respects charged in the complaint, with respect to the operation and control of the locomotive in question; on the ground that there is no substantial evidence to show that there was anything improper in the operation of the locomotive, as to the actual controlling of its movement nor as to the giving of signals of its approach.

Secondly, as to a second ground, now directed only at the claim made for injuries on behalf of John Martin Souza and of the claim made on account of the death of Antonio Azavedo Souza, first upon the ground that any negligence of the minor son is imputed to the father under the provisions of the California Motor Vehicle Code, Section 352, subdivision (b), and upon the ground that there is no evidence to support any finding except the finding that the minor son, John Martin Souza, the operator of the automobile, was guilty of negligence in trying to oper-

ate his automobile there, and attempting to cross the railroad tracks, and, more specifically, and in addition, that he was negligent in failing to look and to listen and to give heed to the approach of the locomotive and carelessly drove and operated his automobile in front of a locomotive that was approaching, plainly open to his view, and that he did so at a time when he was in a place of safety, where he could stop short of the track and have avoided the accident. He attempted to cross in front of a locomotive [327] approaching in plain view.

The Court: The motion will be denied.

(Thereupon the court and counsel discussed the instructions, the court indicating what instructions he intended to give.)

The Court: Before we withdraw, I want to make one observation for the record. I want to say now, while the jury is not present, the observation that I made concerning questions asked or discussion was prompted by a suggestion made by counsel for the plaintiff in the presence of counsel for the defendant in chambers, that not so much he, but his client felt that perhaps some observation I made about the weather, the unusual weather, or the word "unusual" that I put in a question asked might convey to the jury the impression that I was casting a doubt on the fact that a haze could occur. I used the phrase in the manner in which we use it generally in California, where every time you talk about the weather you declare it to be unusual, and I did

not intend to give my own impression of what the weather was, because Stanislaus County, along with most any county of the State, can have unusual weather. In fact, I have said that there is not a county in California where you could establish definite seasons without having exceptions to the matter, and it was not my intention at all to comment on the facts. I did not mean to indicate at all that I thought the testimony of the witnesses that it was hazy did not carry conviction. That fact was indicated by the fact that I referred to the tule fogs and the like, with the idea of having him give us all the information as to the nature of this atmospheric condition when the boy, himself, was on the stand. So I want the record to show that counsel called my attention to that, and my object in doing it at this time is to correct any such impression that may have arisen in the case by reason of the questions I asked or the manner in which the questions were phrased.

Mr. Dunne: As long as your Honor is stating that for the record, I think it should be completed by adding to it that your Honor then informed both counsel in chambers what you would do, and both counsel expressly or impliedly indicated that that was satisfactory.

The Court: All right. The record also shows that while I made no reference to the incident, that counsel were given an opportunity to have me amplify the remark and make more pointed references if they so desired.

Mr. Myers: That is right.



The Court: Sometimes, by referring to a matter like this you asseverate it and you admitted that in chambers, that you, yourself, did not know whether it was necessary, and I volunteered to say that I would of my own accord, make references to the matter in a general manner so that there would be no misapprehension on the part of the jury, that no observation [329] that I may make or any question I may ask is to be taken as indicating any opinion as to any of the facts in the case. All right.

(Thereupon an adjournment was taken until tomorrow, Friday, July 23, 1948, at nine o'clock a. m.) [329-a]

Friday, July 23, 1948, 9:00 o'clock a. m.

(Counsel for the respective parties made their closing statements to the jury, after which, and at 1:30 p. m., the court instructed the jury as follows:)

### CHARGE TO THE JURY

The Court: Ladies and gentlemen of the jury, the court will now instruct you as to the law which is applicable to the case. As you have already been informed, all the instructions are written and will be read to you as written, with such changes as may suggest themselves as I read the instructions. Sometimes as I read an instruction I catch repetition, and I try to avoid repeating the same thing, and I stop and eliminate the part I think is repetitious. The only instructions which will be oral will be those given to you toward the

end of the charge, dealing with your conduct in the jury room, and the forms of verdict. If during your deliberations you desire a copy of the instructions they will be sent out to you if you make that desire known to the bailiff at the door. That also applies to all the exhibits in the case, both exhibits introduced by plaintiffs and the defendant, and the exhibit on the board, which is the Court's Exhibit. However, that exhibit, although designated as the Court's Exhibit, is an exhibit in the case. I merely introduced it because counsel agreed that it would be helpful and neither [330] had started the case, and I think Mr. Dunne put it on while he was giving the oral argument, and so I adopted it as the Court's Exhibit, but it is an exhibit in the case, no matter who claim paternity for it, and all of those will be sent to you as soon as you make your desire known, and if you desire this chart I think I will order it rolled in on the board so there will be no change of position, and you will have it before you and examine it in the jury room just as you face it in the courtroom.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied

as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to [331] base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion, and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your mind. In other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

In weighing the evidence you are to consider the credibility of witnesses who have testified in the

case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence, their manner on the stand, their relations to the parties, if any, their degree of intelligence, and the reasonableness or unreasonableness of their statements, [332] and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testified, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty, or integrity, or by his motives, or by contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who has willfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvertence, but willfully and with a design to deceive, you must treat all his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has, in other particulars, sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the

trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts. [333]

Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inference which you may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

In a civil case, such as this, the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence. The law does not require a demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. The burden is upon the plaintiff to prove his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

If evidence for the defendant has been given by its employees, if you find that the testimony of such an employee [334] is not inherently improb-



able, is uncontradicted, and the employee and his testimony are unimpeached, then you are not at liberty to disregard that testimony solely upon the ground that it is given by one of defendant's employees. Nor are you to discredit the testimony of an employee solely because you may discredit, if you do discredit, the testimony of some other witness.

Or, differently put, the standards of credibility just given you in these instructions apply equally to all witnesses, including the employees of the defendant.

By this action the plaintiffs seek to recover damages from the defendant for death and injuries alleged to have resulted from the negligence of the defendant acting through its agents and employees.

The defendant has denied any negligence on its part, or on the part of any of its agents and employees. In addition it has pleaded negligence on the part of plaintiffs or others acting for them which proximately caused and contributed to the injury. It has also pleaded that the injury resulted from the negligence of the plaintiffs which was the sole cause, and sole proximate cause of the accident and injury.

You are instructed that there are before you three distinct actions, each of which must be determined by you on its own merits, and in accordance with the instructions hereafter [335] given to you.

For the convenience and purposes of trial, the three cases have been consolidated by stipulation of counsel for the respective parties.

The case of Josephine Souza against the Southern Pacific Company, et al., is an action brought by the plaintiff herself individually, and as guardian ad litem of her minor children, John Martin Souza, Lucille Josephine Souza, James Lawrence Souza and Benjamin Souza, and Mary Adele Souza, an adult child, all children being the natural issue of the plaintiff Joseph Souza, and her deceased husband, Antonio Azevedo Souza, for whose death the said parties prosecute this action.

Another of the consolidated cases is that of Geraldine Souza, Lawrence Souza and Richard Souza, minors, by and through their guardian ad litem, H. G. Eastman, against the Southern Pacific Company, and in this action, Geraldine Souza is the surviving widow, and Lawrence Souza and Richard Souza are the surviving minor children of Edward Anthony Souza, deceased, and Geraldine Souza, and Geraldine Souza being herself a minor of the age of twenty (20) years at the time of bringing this action has sued through her guardian ad litem and the guardian ad litem of the minor children, H. G. Eastman. They are prosecuting this action for the death of Edward Anthony Souza.

The third action is one brought by John Martin Souza, [336] a minor, by and through his guardian ad litem, Josephine Souza vs. Southern Pacific Company, for personal injuries alleged to have been sustained by him from the happening of the accident in question, and said John Martin Souza at the time of bringing this action was a minor of the age of nineteen (19) years.

Although in this action there are three separate sets of plaintiffs, the case of each set of plain-

tiffs is separate from and independent of that of the others. The law permits them to join as plaintiffs solely because their claims involve the same accident; however, their rights, if any, are separate, not joint. The instructions given you apply to each plaintiff unless otherwise stated, and you will determine each plaintiff's case separately, to the same effect as if you were trying three separate actions.

It is admitted by the pleadings that the accident with which we are concerned was a collision between an automobile driven by John Martin Souza and a Southern Pacific Company railroad locomotive at a point in Stanislaus County in this State where Beckwith Road intersects the railroad track. It is also admitted that the accident happened in the daylight hours and the answer admits that the accident happened at 9:02 a. m. on the morning of October 11, 1945.

The mere fact that an accident happened, considered alone, does not support any inference that some party, or any party, [337] to this action, more particularly the defendant was negligent.

The defendant railroad and its employees in engaging in the railroading business and in operating a railroad were engaged in a legitimate and lawful business, and in considering the claims made by plaintiffs in suit here, you will bear in mind that the defendant railroad and its employees are entitled to the same consideration at your hands as any individual or corporation engaged in any other form of business.

Everyone is responsible for the injuries occa-

sioned to another by his or their want of ordinary care or skill in the management of his or their property or person, except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

An act of an employee within the scope of his authority as an employee, or within the course of his employment as an employee, is an act of his employer, and the negligence of the employee in the performance of his duties, is the negligence of the employer.

If you find from a preponderance of the evidence in this case that the defendants carelessly or negligently operated the locomotive at the time and place in question and as sole proximate result thereof plaintiff John Martin Souza was injured and Antonio Azevedo Souza and Edward Anthony Souza were killed without fault on their parts, your [338] verdict will be in favor of the plaintiffs for such damages as they may have sustained.

The gist of plaintiff's action being negligence, he must prove it. The defendant, Southern Pacific Company, is not liable simply because there was an accident and injury, if that was without fault on its part. Liability can be imputed to Southern Pacific Company only if the plaintiff proves two things by a preponderance of the evidence—first that there was negligence in the particulars charged in the complaint, and, second, that such negligence, if any there was, was a proximate cause of the accident. A defendant does not have the burden of proving freedom from negligence—to the contrary, the burden of proving negligence is on the party who charges it, in this case, the plaintiff.



The rights and obligations of the operator of a train and of the driver of a motor vehicle, both using a public street, are reciprocal; each owes to the other the exercise of ordinary care to avoid an accident.

When a railway company has a right to run its trains over and upon a public crossing, such as the one here involved, in running its trains thereon, where the public also has a right to travel, the railway company must exercise such care and precaution for the purpose of avoiding accident, injuring property or persons, as reasonable prudence would suggest, and [339] as are in its power to employ.

I instruct you that as a matter of law the rules with reference to the rights and duties of parties in the accident here complained of and in this lawsuit are not, in all respects, those which would apply in the case of a person approaching or crossing the tracks of a street railroad, laid on a street in a city, but, to the contrary, are in some respects distinct, and are rules which the law has worked out as particularly applicable to steam railroads. These rules which are specifically applicable to steam railroads will be given to you in these instructions, but I now call to your attention the fact that they are in some respects different from the rules for street railroads, and this is true, both as to the rights and duties of persons approaching or crossing the tracks and as to the rights and duties of the operators of the train. [340]

The law required of the Southern Pacific Company in the exercise of ordinary care to give the



signals required by law in the operation of its train to avoid injury to persons lawfully crossing the tracks. Whether ordinary care has been exercised in a particular situation is to be determined by you from all of the circumstances of the particular case. The care must be commensurate with the probable danger to be avoided. The greater the danger, the greater the amount of care which must be used. In other words, the amount of care to be exercised must correspond to the degree of apparent danger to be avoided.

There is no statute of this state, nor any ordinance or other rule of any governmental body, fixing or restricting the speed at which a steam railroad, such as Southern Pacific Company, may operate its locomotives on its tracks along its right-of-way, and over the public highway, at the point at which the accident complained of happened.

However, a railroad company must regulate the speed of its trains over public highway crossings with proper regard for the safety of human life and property. The character of a crossing affects the duty of the railroad company toward travelers on the public highway and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger. The question whether or not a rate of speed is excessive is one of fact for the jury to determine with relation to the particular circumstances of each case. [341]

You are instructed that the law of the state of California, among other things, provides:

A bell must be placed on each locomotive engine

and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle, air siren, or air whistle must be attached and be sounded, except in cities, at a like distance, and be kept sounding at intervals until it has crossed the same.

You are instructed that the following rules and regulations of the Transportation Department of the Southern Pacific Company were in full force and effect at the time of the happening of this accident:

Rule 14: A whistle of two long, one short and one long blast will be sounded when approaching public crossings at grade, tunnels and obscure curves; to be commenced sufficiently in advance to afford ample warning but no less than  $\frac{1}{4}$  mile before reaching a crossing, and prolonged or repeated until engine has passed over the crossing.

Rule 30: The engine bell must be rung when an engine is about to be moved; while passing through tunnel; while approaching public crossings at grade, beginning sufficiently in advance to afford ample warning, but not less than  $\frac{1}{4}$  mile before reaching such crossing; and continuing until the engine has passed over the crossing; and [342] otherwise when necessary as a warning signal.

Rule 31: The whistle must be sounded at all places where required by rule or law or to prevent accident.

However, the court instructs you that these rules bear merely on the fact that the railroad company

recognized its obligation to give warnings by bells or whistles at certain places by instructing its employees on the subject and prescribing the manner in which such signals should be given.

But ultimately the question before you is not whether the whistle was blown or the bell rung in the manner prescribed but whether they were blown or rung at all.

And even then the fact is not important unless you find that the failure to do either was the proximate cause of the accident.

In this regard, I further instruct you that, in order to comply with this statute, it is not necessary for the railroad company to both ring a bell and blow a whistle, but, on the contrary, the doing of either one or the other, in compliance with the statute, is sufficient, so that if the bell has been rung, as provided in the statute, the whistle need not be blown, and, conversely, if the whistle has been blown as provided in the statute, the bell need not be rung. If the whistle is used, it need not be sounded continually, but it is only required that it be sounded at intervals. Of course the railroad may, if it so desires, go beyond the terms of the statute, and cause both the bell to be rung and the whistle blown.

Under the statute which deals with sounding of whistle or bell by a steam locomotive, it is the sounding or giving of the warning and not the hearing of it which determines the question of statutory violation. On this phase of the case, the only issue is whether a signal, as required by the statute, was sounded. If a signal was sounded

in the manner required by the statute, the fact that it may not have been heard by some person, is not ground for finding that the statute was violated.

You are instructed that if you shall find from the evidence that the train sounded the necessary signals required by law as herein defined, then the law has been complied with and your verdict should be for the defendant.

You are instructed that it is as much negligence to fail to see that which can be seen by the exercise of ordinary care, as it is negligence not to look at all.

Negligence is the omission to do something which a reasonable person, guided by those considerations which ordinarily influence a person of reasonable prudence, would do under all the circumstances of the situation in question, or the doing of something which a person of ordinarily reasonable prudence would not do under all the circumstances of the situation in question. The question whether or not there was negligence in a particular instance should be determined by you from all the circumstances and conditions as shown in the evidence at the time surrounding [344] the person against whom the negligence is charged. Ordinary care as used in these instructions is that degree of care that an ordinarily prudent person exercises under the same or similar circumstances and is never absolute, but relates to circumstances, time and place, and a failure to use such care is negligence.

Negligence is a comparative and not a positive term. It always relates to some circumstances of

time, place or person. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances.

You cannot compare the negligence of defendant with the negligence of plaintiff, and attempt to determine which was guilty of the greater negligence. There can be no recovery against defendant by plaintiffs if plaintiffs were guilty of negligence no matter how slight, and such negligence contributed proximately and concurrently to the accident.

In considering the question of contributory negligence of the plaintiffs, I instruct you that the burden is on the defendant to establish by a preponderance of the evidence that the plaintiffs or any of them were guilty of contributory negligence, which proximately contributed to the injuries, and if the evidence on that issue is, in your judgment, evenly balanced, or if it preponderates against such contributory negligence, then it is not proved and you should find that the plaintiff is [345] not guilty of contributory negligence.

Contributory negligence is a want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. If you find that at the time of the accident, plaintiff was guilty of contributory negligence, no matter how slight, which contributed proximately to the accident, then



plaintiff cannot recover against defendant, even though you find defendant was also negligent.

In order to find a verdict for the plaintiffs, you must not only find from a preponderance of the evidence that the defendant was negligent but also that such negligence was the proximate cause of the injuries to plaintiff, and you must further find that the evidence fails to show by a preponderance thereof that plaintiff was guilty of negligence, however slight, which contributed proximately thereto; otherwise, your verdict must be for the defendant.

Contributory negligence is an affirmative defense, and the burden of proving contributory negligence, as I have already stated, rests on the defendant. But in considering this rule, you will bear in mind that, in determining the question of contributory negligence, you must consider the evidence which has been introduced on the plaintiffs' case, as well as the evidence introduced by defendant. If the evidence introduced on the [346] plaintiffs' case itself shows contributory negligence, a defendant may rely on that evidence without itself introducing any evidence. So, also, if the evidence introduced on the plaintiffs' case, in conjunction with the evidence introduced by the defense, shows contributory negligence, you must find in accordance with all the evidence, even though the evidence for the defense, if it stood alone, might not show contributory negligence. In considering the issue of contributory negligence, it is your duty to consider all the evidence which has been introduced.

It was the duty of defendant's employees in

charge of the operation of its train at the time and place here in question, to keep a lookout ahead for persons using the crossing, to give timely notice of the approach of the train by the ringing of its bell or the blowing of its whistle, as required by law, and to exercise ordinary care to prevent injury to persons using the crossing and themselves exercising ordinary care. Failure of defendant's employees to perform any of these duties would constitute negligence on the part of the defendant.

Even where there is no statute or ordinary on the subject, it is the rule in respect of the right-of-way at a railroad crossing that a vehicle or person approaching a steam railroad crossing, with the intention of going over the tracks, is under duty to yield the right-of-way at that crossing to any railroad train which may be approaching the crossing. It is not the [347] duty of the railroad train to stop and wait for the person or vehicle to cross, but, to the contrary, it is the duty of the traveler to stop and allow the train to pass if he cannot pass over ahead of it in safety.

A railroad track, the presence of which is known and which is known to be in use for the operation of railroad trains, is itself a warning of danger, without any other sign or signal, or warning. It is a warning to persons who have reached years of discretion and who are possessed of ordinary intelligence that it is not safe to cross it without the exercise of constant vigilance, in order to be made aware of the approach of a

train, and thus be enabled to avoid receiving injury.

Any person going toward and into a place where he knows there is danger of injury from moving railroad trains, is required to exercise greater vigilance and care than would be required of him in circumstances where danger from moving trains is not reasonably to be anticipated, and if he neglects to exercise any of the vigilance which the situation, in all the circumstances requires, he is guilty of negligence.

It was the duty of the driver of the automobile, John Martin Souza, to approach the railroad track at the crossing in such a manner and at such speed as to be able to control the movements of his automobile and to stop the same in the event it should appear to be dangerous to attempt to cross the tracks; and it was further his duty to look and listen before attempting [348] to cross the tracks and to give heed to the warning of a whistle or bell of an approaching locomotive if the same was being sounded audibly in order to ascertain if any locomotive was approaching the crossing and give heed to the locomotive itself if the same were open to his observation. And if, before going across the track, John Martin Souza, the driver of the automobile, by the use of ordinary care could have learned of the approach of the locomotive on the track in time to have avoided it by exercising ordinary care, but failed to do so, then he was guilty of negligence.

A passenger who goes in a vehicle of another, who does not exercise any control or have any legal right of control, over the conduct of the

driver, does not become responsible for the negligence of the driver, nor can the negligence of the driver be imputed to him in such case.

However, the driver and each of the passengers in the automobile was under a continuing duty to exercise reasonable care for his own safety at all times.

You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution, as required by law.

In determining whether the plaintiff John Martin Souza [349] exercised care sufficient to live up to the duty imposed on him and whether he was negligent, you are instructed that any want of care on his part, if so you find, is not excused by any assumption he might make that the operators of a locomotive which might be approaching would not be negligent, or that any locomotive which might be approaching would be operated in any particular way, whether as to speed or signals or otherwise. He was required to exercise reasonable care at all times, and to do so independently of the manner of the operation of the locomotive or the giving of signals, or warnings, or the failure to do so, if there were such failure. Any assumption which he might make as to the manner of operation of the railroad or any locomotive on the railroad could not excuse negligence on his part, if any there were. Even if no signals



were heard, and indeed, even if none was given, that would not excuse his negligence, if he was guilty of any.

It is the duty of those operating an engine and train to keep a reasonable lookout in front of the train and to use ordinary care to avoid striking or injuring persons or vehicles lawfully using the street whereon the train is being operated.

A railroad company has the right against one approaching the crossing to operate its engines and cars in the usual and ordinary way and to make such noises or movements as are usually and necessarily made by trains in motion under such circumstances, but it is its duty through its engineers, and other employees [350] to exercise reasonable and ordinary care and precaution in operating its trains and cars at crossings to avoid injury to a person who is himself using ordinary care and caution for his own safety thereat.

You are instructed that while the tracks of a railroad, such as that involved in this case, are in themselves a warning of danger, and while it is true that before one drives a vehicle into the space which would be occupied by a train if it were to pass over such tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of train, engine or car on the tracks, you are instructed nevertheless that in determining whether or not the driver, in crossing over the tracks at the time of the accident in question, used every reasonable opportunity to look and listen for the approach of train, engine or car depends on all the surrounding circumstances, as



they would be met and viewed by a person of ordinary prudence, if he occupied the same position as the one whose conduct is in question.

A railroad locomotive which is in plain view operating along a railroad track and toward a highway crossing at grade is itself a warning of danger without any other sign or signal or warning and any person in an automobile approaching the crossing, whether driver or passenger, is under a duty to exercise reasonable care to observe and heed that warning, whether other warnings or signals are given or not. [351]

If you find that as the automobile approached the crossing where the accident happened, the view of the approaching locomotive was obstructed, still you cannot impute to defendant any responsibility for the existence of such obstructions to vision unless the plaintiffs have sustained the burden of proving by a preponderance of the evidence that such obstructions were on the railroad right-of-way, or subject to the defendants' control.

If you find that while the automobile was in a place of safety, approaching the crossing, the driver by looking could have learned of the approach of the train in time to have avoided the accident, by exercising ordinary care, and that in the exercise of ordinary care, he should have looked at such point, but did not, and looked for an approaching train or locomotive only when the automobile was so close to the track that if a locomotive were approaching, it could not be avoided by exercising reasonable care, he was guilty of negligence.

If, as the automobile approached the railroad tracks there was a place of safety in which the automobile could have been stopped before reaching the track and from which an observation of the track could have been made and that the exercise of reasonable care in the circumstances required that an observation of the track be made before an attempt was made to cross the track and that in the exercise [352] of such care to make the observation, the automobile should have been so stopped, and at such place, had the automobile been stopped, an observation could have been made of the approaching locomotive, and its approach could have been learned and that the driver negligently failed to stop the automobile and learn of the locomotive's approach before attempting to drive across the track, then he was guilty of negligence and if that negligence was a proximate cause of the accident here in question, the plaintiff cannot recover.

If the automobile drove from safety to a place of danger and was struck by the locomotive in such a short space of time that the injuries and deaths resulted before the fireman could have time to warn the engineer and the engineer could have time to apply the brakes, it is immaterial in this case whether the brakes were or were not applied and it is also immaterial when they were applied, if they were applied at all.

If as the railroad train was being operated along the tracks and toward the crossing, a motor vehicle was driven toward the track and train, and if, until the vehicle was first seen by the

train crew, there was negligence on their part, then, if, when they first saw it, it was so close to the train and was approaching the crossing in such manner that a collision seemed imminent, and the operators of the train were then suddenly, and without negligence on their part, confronted with a situation of imminent danger which [353] demanded immediate action, they were required, in such circumstances, to act only as reasonable men would act in such circumstances of sudden discovery of emergency and danger, and their conduct is not to be tested by what might have been done if there had been time for mature and considered deliberation.

If the driver of the automobile, John Martin Souza, was guilty of any negligence which was the sole proximate cause of the accident, injuries and death, it will be unnecessary for you to consider any other question in the case, and you will return your verdict in favor of defendant.

I now desire to call your attention to certain other provisions of the Vehicle Code of the State of California to be considered by you under the evidence and the instructions of the court.

Sec. 250 provides:

“It is a misdemeanor for any person to drive a motor vehicle upon a highway unless he then holds a valid operator’s or chauffeur’s license issued hereunder except such persons as are expressly exempted under this code.”

So far as we are concerned with it, the only exemption is that of a case of a minor over fourteen years of age who may apply for and receive

an instruction permit entitling him to drive a motor vehicle upon the highways, but this exemption applies only if he has such a permit in his immediate possession, the permit is good only for a period of ninety days after [354] it is issued, and it is good only when he is operating the motor vehicle when accompanied by, and under the immediate supervision of a licensed operator or chauffeur.

It is further provided by Sec. 265 of the Vehicle Code that application for an operator's license shall give certain information, including a statement whether the applicant has normal use of both hands and feet, understands traffic signs and signals and whether the applicant has ever been afflicted with certain specified diseases.

When the application is made, then, under Vehicle Code Sec. 267, the applicant shall be examined and the examination shall include a test of the applicant's knowledge and understanding of the provisions of the Vehicle Code governing the operation of vehicles upon the highways, his understanding of traffic signs and signals, and he shall be required to give an actual demonstration of his ability to exercise ordinary and reasonable control in operating a motor vehicle. The examination shall also include a test of his hearing and eyesight and such other matters as may be necessary to determine his mental and physical fitness to operate a motor vehicle upon the highways. The Vehicle Code, Sec. 269, specifies that license shall be refused to an applicant who is unable, as shown by examination, to understand

traffic signs and signals or who does not have a reasonable knowledge of the provisions of the Vehicle Code governing operations of vehicles upon the highways or [355] where it appears by examination or other evidence that the applicant is unable to operate a vehicle upon a highway safely because of physical or mental defect or lack of skill.

The fact that a person driving an automobile is unlicensed does not, in itself, constitute negligence. Nor is it *prima facie* proof of negligence.

But it is a fact which you have the right to consider in determining whether John Martin Souza was guilty of negligence which directly and proximately resulted in or contributed to, the accident. Differently put you may consider the fact that John Martin Souza did not possess a license if you find a casual connection between that fact and the accident complained of.

By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents shall be imputed to such parents for all purposes of civil damages. Accordingly, if you find from a preponderance of the evidence that John Martin Souza, a minor, drove the automobile with the permission, express or implied, of his parents and that there was negligence on his part which was a proximate cause of the accident and of the death of his father, Antonio Azevedo Souza, such negligence



is to be imputed to the father with the same effect as though the father himself had been guilty of negligence. [356]

To summarize this portion of the instructions:

It is not enough that the plaintiff establish by a preponderance of the whole evidence in the case that the defendant was negligent. Plaintiff must go further, and prove by a preponderance of the evidence that the negligence, if any, on the part of the defendant contributed directly and proximately to the injuries to plaintiff, and it is immaterial whether or not the defendant was guilty of some negligence unless it was such negligence as caused or contributed directly and proximately to the injuries to the plaintiff.

The law therefore imposes on plaintiff the burden of proving two things by a preponderance of the whole evidence: that is (1) that the defendant was guilty of negligence, and (2) that such negligence of the defendant directly and proximately caused or contributed to the injuries of the plaintiff.

In cases of this sort it is customary for the complaint to allege an amount of damage claimed. There are such allegations here. These allegations are merely a claim. They are not in any sense evidence or proof and are not to be taken by you in any sense as evidence or proof of what damages should be awarded, if you award any damages. If you award any damages, the amount of damages you must resolve for yourselves in each case under the instructions which I have given

you and upon the evidence which has been introduced. [357]

If your verdict is for the plaintiffs, then in estimating their damages you may take into consideration the loss of support, if any, sustained by them on account of the deaths of the decedents; and in estimating the value of such loss you may determine the amount that the decedents would in all reasonable probability have earned in the years yet remaining to them, deducting therefrom the amount which they would reasonably require for their own personal use or maintenance; furthermore, you may consider the value to the wives and children of the comfort, society and protection, if any, of which they have been deprived; and from all of these elements you will resolve what sum will fairly compensate plaintiff for the pecuniary loss sustained by them, not however, in excess of the amount prayed for in the complaints.

No damages can be awarded in an action for death, for grief, sorrow and mental suffering of the heirs. This rule does not, however, preclude compensation to the heirs at law of a deceased person for pecuniary loss suffered on account of the deprivation of the society, comfort and protection of the deceased.

Under the law in effect at the time involved in this action, and so far as the same is applicable to the matters alleged, it is provided as follows:

“When the death of a person \* \* \* is caused by the wrongful act or neglect of another, his heirs [358] may maintain an action for damages against the person causing the death.

Such law further provides that in such action 'such damages may be given as under all circumstances of the case may be just'."

Compensatory damages are not subject to proof. In other words, it is not necessary that any witnesses should have expressed an opinion as to the amount of such damages. You may make such estimate of damages from the facts, circumstances and evidence in the cause in the light of your knowledge and experience in the affairs of life.

However you must not allow for elements of damage which are speculative or conjectural.

Where an action is brought on account of the death of a person, such action is solely for the purpose of compensating for the pecuniary loss, if any, suffered by reason of the death. Accordingly, if you should return a verdict for any plaintiffs for damages for a death, your award must be restricted to such an amount as will reasonably compensate for any pecuniary loss suffered, and for that alone, and the burden of proving pecuniary loss is upon the plaintiffs. There can be no substantial recovery on behalf of a person who has not suffered substantial pecuniary loss. The action, as I have already stated, is not for the loss of an object of love and affection, and the law does not recognize the loss of [359] an object of love and affection as a ground for allowing damages, but restricts recovery to pecuniary and financial loss. Nothing can be allowed on account of any sentimental value which may have attached to the life which has been lost.

The pecuniary interest of a child in the loss of a father does not necessarily end at the arrival at the age of majority, but the jury may allow for the probable loss of benefit, if any, of a pecuniary value which the child would with reasonable certainty, receive from its parent either before or after arrival at majority.

In dealing with the question of prospective loss of contributions, you will remember that it is the prospective loss of contributions and not the earnings or earning power of the deceased which is the matter to be given consideration; and where the deceased would have applied for his own benefit part of his earnings, in determining the loss of contributions to the beneficiary, if any, such part of the earnings as the deceased would have applied or used for his own benefit must be deducted. The plaintiff has the burden of proving what, if any, part of the earnings of the deceased would have been contributed to the statutory beneficiary.

If damages are awarded, the only amount which you can award is such as reasonably to compensate for the detriment suffered. If damages are awarded, they must not, in any event, exceed [360] what is reasonable. They must not be enlarged so as to constitute either a gift or windfall to the plaintiffs or punishment or penalty to the defendant. The only purpose of damages is to award reasonable compensation. There is no purpose here to inflict punishment or impose any penalty or to make an award for the sake of example.

The following instruction applies only to John Martin Souza:

For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

If the plaintiff, John Martin Souza, is entitled to recover, the measure of his recovery is what is denominated compensatory damages, that is, such sum as will compensate him for injury he has sustained. The elements entering into damage are the following:

Such sum as will compensate for the reasonable expenses paid or incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding amounts therefor shown by direct evidence and stipulation of counsel.

The value of his time during the period that he was disabled by the case, if the evidence shows that he was so disabled.

The value of any property of his which was damaged. [361]

Such reasonable sum as the jury shall award him on account of pain and anxiety he has suffered by reason of his injury, and is certain to suffer in the future.

The first three of these elements are the subjects of direct proof and are to be determined by the jury on the evidence they have before them.

The other elements are, from necessity, left to the sound discretion of the jury, to be exercised



in accordance with the instructions here given and under the facts proved in the record.

If you should return a verdict for the plaintiff in this case, then I instruct you that, as a matter of law, it will be improper for you to attempt to measure the damage occasioned by any injury which plaintiff may have received, by attempting to put yourselves in plaintiff's place or ask yourselves what sum you would take to make such an exchange of place. The plaintiff's injury has already been suffered, and you cannot measure the damages for it by attempting to say what you would take for such an injury. The only thing you are entitled to consider is what sum would reasonably compensate for any injury any plaintiff may have suffered.

You are not, in ascertaining the amount of damages, if any, to resort to the polling plan or scheme, which has sometimes been adopted by juries for such purposes, contrary to law. That plan or scheme is where each juror writes the [362] amount to which he considers the plaintiff entitled, and the amounts so written are added together, and the total divided by twelve. This is a quotient verdict and is a scheme of chance, not allowed by law, as no element of chance may enter into your verdict or into the determination of any question necessary thereto.

If you believe from the evidence, and from the instructions of the Court that defendant is not guilty of the negligence charged, then you have no right to compromise the question of defendant's liability and award the plaintiffs some amount

merely because someone was killed or injured on the occasion in question. If you believe that the defendant was not negligent as charged in the complaint, then you will have no occasion to consider at all the question of damages.

The fact that I have instructed you upon the measure of damages is not to be taken by you as an intimation that I believe the plaintiff or any of them is entitled to recover damages. These instructions are given you solely to aid you and guide you in finding a verdict in the case, in the event you find that the plaintiff, or any of them, is entitled to recover.

And I add, in conclusion, that if from the evidence and under the instructions as I have given them you, you do not believe the plaintiff, or any of them, is entitled to recover, the instructions given on the subject of damages lose their entire significance and need not be considered at all. [363]

Your first duty upon retiring to the jury room to begin your deliberations in this case will be to select one of you to act as the foreman in the case. As you were already informed, the jury in Federal cases in Federal courts is what is known as a common law jury. It requires unanimity, which, as the word implies, means that all twelve of you must agree before any verdict can be returned as to any of the plaintiffs in the consolidated actions.

For your assistance, the Clerk has prepared certain forms of verdict. The first form reads, omitting the court and cause, "We the jury find in favor of the plaintiffs and assess the damages against the defendant in the sum of (blank) dol-

lars; on behalf of the plaintiff, John Martin Souza, et cetera, in the sum of (blank) dollars; in behalf of the plaintiff, Geraldine Souza and others, in the sum of (blank) dollars; in behalf of the plaintiff Josephine Souza, et al., dated this blank day of July, 1948, ..... Foreman.”

You must determine the verdict separately as to each of the plaintiffs involved. If you find in favor of the plaintiff John Martin Souza, then you will insert the amount of damages at the place indicated in front of his name. If you find in favor of the plaintiff Geraldine Souza, you will insert the amount you award as damages in the place indicated in front of her name. If you find in favor of the plaintiff Josephine Souza, you will insert the amount in the place indicated in [364] front of her name.

Because there are three forms of verdict, I have had the clerk prepare a general form and separate special forms. If you find in favor of defendant against all the plaintiffs, then you may use this form of verdict: “We the jury find in favor of the defendant. Dated this (blank) day of July, 1948, ..... Foreman.”

If you find in favor of the defendant as against any of the three, less than all, then you can use the form of verdict containing the plaintiff’s name. There is one, for instance, which says, “We, the jury find in favor of the defendant and against the plaintiff John Martin Souza.” You will use that if you find against that plaintiff and in favor of the defendant, as to that case. Another one has the name of Geraldine Souza. You will use

that if you find in favor of the defendant and against Geraldine Souza. And if you find a verdict in favor of the defendant and against the plaintiff Josephine Souza, then you will use this particular form. Whichever your verdict is, the form must be dated and signed by your foreman and returned to this court.

Are there any objections to the instructions given or refused? If so, an opportunity will be given to present them outside the presence of the jury. We will either retire to chambers or we will let the jury retire to the jury room while we discuss any objections to any of the instructions. [365]

Mr. Myers: That is agreeable, your Honor.

The Court: What is agreeable?

Mr. Dunne: Whichever you stated is agreeable.

Mr. Myers: Shall we retire to your chambers?

The Court: I think we had better let the jurors retire. They will be freer in the jury room. This is off the record.

(Off the record statement of the court.)

The Court: May it be stipulated the usual admonition has been given?

Mr. Dunne: Yes, your Honor.

Mr. Myers: Yes, your Honor.

The Court: You may withdraw from the courtroom.

(Thereupon the jury retired from the courtroom, and in their absence the following objections were made:)

Mr. Myers: For the purpose of the record, your

Honor, may I object to the giving of Defense Instruction No. 58-F, which had to do with the operator's license, on the ground that it had nothing to do with the happening of the accident at all, and it covered a situation just in, you might say, a similar manner in which my proposed instruction was drawn on a provision of the Penal Code with reference to one failing to sound a whistle or a bell before going across a crossing; in other words, both of those things relate to persons violating the law being guilty of a misdemeanor. It did not seem to me, at least, that the absence of an operator's license had anything to do with the happening of this accident.

The Court: That is a question of fact. That is why I worded it the way I did, and I modified it by saying that the violation of any of those sections meant nothing unless they can find a casual connection between that and the accident.

(Discussion.)

The Court: We must not keep the jury out too late. It is 3:30 now.

Mr. Myers: I was under the impression the jury was out deliberating.

The Court: No, the jury is not out deliberating. The jury is not out deliberating until the bailiff is sworn, because you may convince me I am wrong. This is off the record.

(Off the record statement.)

Mr. Myers: It is my understanding at this time we are going to object to instructions.



The Court: That is right.

Mr. Myers: The other instruction, your Honor, that I objected to your Honor omitting was instruction No. 23.

The Court: I gave that in various forms, and I thought I was harping too much on that. I have no objection to giving it in the particular form, but I gave a long one that you suggested, No. 17, a very long instruction.

(Discussion.) [367]

Mr. Myers: Very well, your Honor. I have no further objections.

The Court: That was merely repetitious.

Mr. Dunne: I will state very briefly, for the purpose of the record my exceptions. I think I understand your Honor's position on these since we have discussed them many times. I respectfully object to the modification of Defendant's Proposed Instruction No. 37, which left to the jury the question of the consent of the father to the driver of the automobile as a matter of fact, instead of instructing that that is a matter of law. I understand your Honor's position.

The Court: I have already told you that to say that, I would have to instruct it was negligence per se.

Mr. Dunne: I appreciate your Honor's position.

(Discussion.)

Mr. Dunne: I respectfully except to the giving of Plaintiff's Proposed Instruction No. 9, in substance and in effect stating to the jury that the

plaintiffs were entitled to anticipate that the defendant would exercise care in the operation of its locomotive, and in connection with that I respectfully object and except to the denial of the Defense Proposed Instruction No. 27, which would have told the jury that the operators of the train were entitled to assume that any traveler traveling upon the highway would perform duties that the laws of the State impose upon him. [368]

The Court: I gave that. I merely cut out the last paragraph.

Mr. Dunne: Yes.

The Court: I do not like to take specific facts and apply each instruction to the specific facts in the case.

(Discussion.)

Mr. Dunne: We respectfully object and except to the failure to submit the question of joint enterprise to the jury as a question of fact, and the question of agency as a question of fact as between the two brothers.

The Court : I may state for the record I did not submit that because there was no evidence upon which a joint enterprise could be based, that the father and brother were going along merely to view a ranch, and there was no showing that they had any interest in the ranch, and they went there merely in an advisory capacity to give their own judgment in the matter.

Mr. Dunne: We respectfully object and except to the failure to give Defense Proposed Instruction No. 56, which would have told the jury that

if the circumstances were such that the plaintiff must have seen, the driver must have seen an approaching locomotive——

The Court: I marked that “Yes” and then I struck it out because I substituted for it a third instruction which I gave in another case, and which distinctly told the jury that [369] if a man had looked he would have seen.

(Discussion.)

Mr. Dunne: We object and except to the failure to give Defendant’s proposed Instruction No. 56, which would have told them that if the approach of the locomotive could have been learned, he did not look or failed to and crossed in front of it.

The Court: I think that is covered.

Mr. Dunne: We respectfully object and except to the failure to give Defendant’s Instruction No. 58-E, based upon Section 596 of the Vehicle Code of California. That is the crowding instruction. We have discussed that.

The Court: Tell the jury we will call them in. They have not begun their deliberations yet. The bailiff has not been sworn. Tell them we will call them very soon. They want some exhibits. Evidently they are getting anxious. Which one are you talking about?

Mr. Dunne: That one is 58-E. That is the instruction that has to do with crowding.

The Court: I decided that there was no violation of any law such as that contemplates. Nobody was sitting on anybody else’s lap. There were

three persons, and there is supposed to be room for the three persons in the front seat of any car, that is, any standard car.

Mr. Dunne: We respectfully except and object to the failure to give Defense Proposed Instruction No. 58, which in substance and effect states that if the circumstances were such that the driver, by looking, must have seen the locomotive in time to have avoided it, any testimony that he looked and did not see may be disregarded by the jury.

The Court: I did not give that, because the other instruction was sufficient. I do not like to single out any bit of testimony for comment on one side or the other.

Mr. Dunne: We respectfully except and object to the failure to give Defense Proposed Instruction No. 58-A, which would have told the jury the mere fact two other persons were in the car did not relieve them or any of them from the duty of exercising ordinary care. Maybe your Honor has covered that.

The Court: I gave that in a different form.

(Discussion.)

The Court: Call back the jury now.

(The jury returned to the courtroom.)

The Court: Let the record show that the jury have returned to the box. Ladies and gentlemen of the jury, the instructions as given by the court are before you without modification, and now the bailiff will be sworn.

(The deputy Marshal was thereupon sworn.)

The Court: You will now follow the bailiff and begin your deliberations in the case. I hand to the bailiff the forms of verdict, and as soon as you notify us about the exhibits [371] we will send them down to you.

We will stand at recess until we hear from the jury. Here are the instructions given and the instructions refused (handing to clerk).

(Thereupon, at 4:50 p. m., the jury retired from the courtroom to consider its verdict.

(At 6:50 p. m., the jury having sent a note to the court, the court convened in the absence of the jury and the following occurred:)

The Court: Let the record show the clerk is present, and counsel are present. I have an inquiry from the jury. It is not signed by the foreman. It was handed to the bailiff. It reads like this: "Amount Mrs. Josephine Souza prayed for to cover funeral expenses of her husband.

"Amount Mrs. Geraldine Souza prayed for to cover funeral expenses of her husband.

"Amount J. M. Souza prayed for car replacement."

Mr. Myers: I guess they are in the record, but I can furnish them right here.

Mr. Dunne: Are your figures the same as those in the prayers?

Mr. Myers: We had better take it off the complaint.

The Court: My thought is, rather than bring them in, if we can agree on an answer to be given,



I will write an answer and make a record of the answer to be sent out. [372]

Mr. Dunne: Reading from the complaint, in the action in which Geraldine Souza is the plaintiff, the amount prayed for for funeral expenses is \$1047.38.

Mr. Myers: We can stipulate that that was the bill that was put in evidence.

Mr. Dunne: I accepted your statement.

The Court: I will write across these the amounts, and with the approval of counsel hand to them, as follows.

(Discussion between court and counsel off the record.)

The Court: All right, gentlemen, I am going to hand this back and then I will instruct the bailiff to tell the foreman to keep it and return it later on:

“The Court has numbered the inquiries and with the approval of counsel answers them as follows:

“1. Amount prayed by Mrs. Josephine Souza for funeral expenses of her husband is \$1157.38.

“2. Amount prayed by Mrs. Geraldine Souza for funeral expenses of her husband is \$1047.38.

“3. Amount prayed by J. M. Souza for car replacement is \$650.”

Now, gentlemen, if you will sign below, here, so that they will know that you approve that, I will send it out. Tell the foreman to sign the inquiry and then return it later in the courtroom when they come back for filing, and not to destroy it. [373]

(Thereupon the court recessed, and at 7:05 p. m. the jury returned to the courtroom, and in the presence of the court and counsel the following took place:)

The Court: Let the record show that the jury have returned to the courtroom. Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you hand the verdict to the court through the bailiff and the clerk? Mr. Clerk, will you read the verdict?

The Clerk: Ladies and gentlemen of the jury, harken to your verdict as it shall stand recorded:

“The jury find in favor of the plaintiffs and assesses the damages against the defendant in the sum of \$1150 on behalf of the plaintiff John Martin Souza; in the sum of \$31,047.38 on behalf of the plaintiff Geraldine Souza, et al., and in the sum of \$16,157.38 on behalf of the plaintiff Josephine Souza, et al.

“Dated this 23rd day of July, 1948.”

Signed “R. R. LOCKHART,  
Foreman.”

So say you all?

The Court: Do you desire to have the jury polled?

Mr. Dunne: If you please, your Honor.

(Thereupon the jury was polled, each juror answering [374] that it was his or her verdict, after which the verdict was recorded and the jury excused.)

Mr. Dunne: May we have the usual stay of execution?

The Court: Yes, stay of execution until ten days after the disposition of the motion for a new trial.

Mr. Dunne: Yes, your Honor.

The Court: You gentlemen will consult me about the date to see that it is made at a time when I am still here or when I can be here.

### CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 375 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ JOSEPH J. SWEENEY,

/s/ KENNETH G. GAGAN.

[Endorsed]: Filed October 22, 1948.

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[Title of District Court and Cause.]

### REPORTER'S TRANSCRIPT OF MOTION FOR NEW TRIAL

Monday, August 9, 1948

Appearances: For respective parties plaintiff: Hildebrand, Bills & McLeod, (By: Sheridan Downey, Jr.) For defendants Southern Pacific Co. and E. S. Glanville: Dunne & Dunne, (By: R. M. S. Boyd.)

The Clerk: Souza versus Southern Pacific Company.

Mr. Downey: This is a motion for a new trial.

The Court: Yes, I have read the papers in the case.

Mr. Downey: Mr. Dunne is out of town and taking a vacation and I have talked to Mr. Myers. We believe that we will be able to arrange on a suitable date to argue the matter either in Los Angeles or here probably early next month if that meets with your Honor's convenience; or perhaps we should go ahead with preparation of briefs.

The Court: Gentlemen, I don't—having tried the case, I can't see that it is a type of case for which briefs are necessary. The question of the sufficiency of the evidence was presented to me. There is only one important question of law and that has become moot, the objections to the instructions. The only objection to the instructions that Mr. Dunne made related to instructions upon the imputed liability to the father. Now, I worked on that very diligently so that both counsel and I finally reached a compromise whereby I gave an instruction to the effect that a new section included that responsibility but I also modified it to include the question of fact whether in fact he had control of the cause. As I said at that time, if the minor is emancipated and drives his own car, it is a question for the jury whether under the circumstances he could control it; but had the jury found against the minor, had they found him guilty of negligence, then the widow of the father—the jury rendered a verdict in favor of all three: the minor who drove the car, the widow of the father—I mean I should say, in

favor of the mother. I don't remember so many. It is hard to remember their first names—in favor of the widow of the young son.

Any question in view of that finding—any question in view of that question of fact—which means that he was not guilty of contributory negligence—then the question has become moot. It is immaterial whether legally the father is not responsible because he is not responsible for the negligence of the minor son who drove the car which the minor son owns and which is in his own name; and although he is not licensed, it becomes absolutely immaterial.

Mr. Boyd: I appreciate your Honor's position there. I merely didn't try the case.

The Court: Yes, I know that that is a disadvantage. I don't like the situation. I am sorry I didn't give instructions in time. I gave instructions not to accept the filing of any motions without consulting me—I mean not to accept a sitting, rather. Strike out filing. But by the time they heard about it, they found it had already been filed, on this date had been set.

It is very difficult to handle any matters relating to a new trial with any other attorney. In fact, I had a situation arise the other day against the Southern Pacific. I frankly expressed my surprise that Mr. Myers wasn't at least there. I said the difficulty I always find is this: that I can talk to the man who was at the trial at which I presided. An entirely different man who reads a cold record and tries to argue abstractions is——



Mr. Boyd: If your Honor please—

The Court: I am merely making a statement. I don't know of anything else that arises on which there is a question of law. Of course the usual allegations are made, the excessiveness of the verdict in the litigation which, of course, can be determined very quickly on the basis of the record. It all depends on the amounts awarded to the two widows—thirty thousand to one, plus the funeral expenses. That doesn't require briefing. That is a question for the Court to consider in the light of his own experience; and as I said in the case *Caldwell* against the Southern Pacific where you gentlemen were on the other end, where the motion was made by Mr. Hildebrand's firm that unless the verdict is very shocking one way or the other that I wouldn't substitute my judgment for that of the jury—and that is a criterion.

Mr. Boyd: If your Honor please, I would like to find your Honor's convenience when this matter could be presented.

The Court: Of course my convenience is right now. You know whenever you state a matter—in fact I travelled from the mountains, from a very pleasant atmosphere in order to take care of several matters, including this. In other words, when a motion for a new trial is set and it is to be heard, I am ready to hear it now.

Mr. Boyd: I merely want Mr. Dunne to be able to present it to you. Now I can get him down here. I don't like to do that, but if your Honor wants to hear it, I will do it, get him down here. Otherwise, I would suggest that Mr. Myers is

frequently in Los Angeles. That is no problem to appear before your Honor down there and we would be glad to do that if your Honor wants to set a definite date for the hearing.

The Court: I will not be back. I do need some vacation and I have already cut into the vacation month and will probably cut more, and we are all of us due in Seattle for the conference—for the judicial conference of our circuit which begins August 31st.

Mr. Boyd: Would your Honor be in San Francisco shortly thereafter?

The Court: Well, I have to come through San Francisco to go home unless I fly.

Mr. Boyd: Could we——

The Court: Well, let me see what there is here. Of course I would hear it in Los Angeles if you want to but I will not be there until after the middle of the month; and having been away, there will be quite a heavy law and motion calendar the first week; although it is my custom to dispose of matters in a district when I am visiting on the basis of it right in the district and that is one of the reasons why Judge Roche had my stay extended to the finish of the month so that I could dispose of every matter.

I am not going to—The observations I made are merely related not so much to hearing the matter. They relate to the proposition that I do not think that the problems are of the character that need briefing. They do not present any involved questions as to which I should put you to the task of writing a brief and counsel to reply

and put myself to using my eyes unnecessarily when the matter can be presented.

Mr. Boyd: I appreciate that.

The Court: It can be presented very very briefly. Mr. Dunne appreciated the difficulties we all have in trying to interpret that section, and I wavered from day to day as we all did trying to read certain language of the Supreme Court of California and finally it occurred to me that I ought to give the instruction I gave, exactly the instructions he propounded, with a slight modification, which I felt justified. He said he saw why, under the facts, I took the position I did, so maybe he can throw more light on it. But I am willing to grant that it is erroneous; but in view of the fact that the jury found that, as a matter of fact, the minor was not guilty—was guilty of contributory negligence——

Mr. Boyd: Yes.

The Court: Then the question of assumption of—the question of the responsibility for the—I got the wrong word. The question of attributing the negligence of the minor to the father or guardian has become a moot question; so in view of that fact, the point cannot be—it would be an abstraction.

Mr. Boyd: I appreciate that Mr. Dunne has quite a burden before him on this motion, but I know he wants to take on that obligation.

The Court: Well, I tell you gentlemen. Let me see——

Mr. Boyd: Any time in September will be convenient, if your Honor please.

The Court: Well, I rather not fix a date. I had rather not fix a date before my return, because there is the uncertainty——

Mr. Downey: Your Honor, any date is satisfactory to Mr. Myers. He is available now and will be any time the Court sets the matter.

The Court: Well, I don't want to crowd the matter, and as you know, I hesitate to come back to hear motions.

Mr. Boyd: Did your Honor want to continue this matter on your calendar here which Judge Roche can handle and we can be advised by your Honor what date is convenient?

The Court: Well, I can set the date now except, as I said, if there is no hurry, I can just set it for September with the understanding it may be heard down there, and if other matters should develop from any of the other cases—there is one which I filed an opinion on today so there might be further proceedings. I still have one matter undecided. It is to be briefed. So I think the best way is to set it for some date in September with the understanding that it is to be heard down there unless you hear from me to the contrary.

Mr. Boyd: Thank you.

The Court: All right, then, we will set it for—I will set it for the 20th.

Mr. Boyd: September 20th?

The Court: Monday, September 20th.

[Endorsed]: Filed November 9, 1948.]

[Endorsed]: No. 12153. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. John Martin Souza, Lucille Josephine Souza, James Lawrence Souza, Benjamin Souza, minors, by and through their Guardian ad Litem, Josephine Souza, Josephine Souza, individually, and Mary Adele Souza and Geraldine Souza, Lawrence Souza and Richard Souza, Minors, by and through their guardian ad Litem, H. G. Eastman, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 13, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 12153

SOUTHERN PACIFIC COMPANYYY, a corpora-  
tion,

Appellant,

vs.

JOHN MARTIN SOUZA, et al.,

Appellees.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD AGREEABLY  
TO RULE 19(6)

Agreeably to Rule 19, paragraph 6, of the rules of the above Court, Appellant, Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of the record as follows:

I.

STATEMENT OF POINTS

The points upon which appellant intends to rely are as follows:

1. The evidence is insufficient to sustain the verdict and judgment, and on that ground the trial court erred in denying the motion of appellant (defendant below) that the jury be directed to return a verdict in favor of appellant and, accordingly, the Court erred in denying appellant's motion for judgment notwithstanding the verdict.

2. Severally, as to each, the claim for damages on account of injury to John Martin Souza, the

claim for damages on account of damage to his automobile, the claim for damages on account of the death of Antonio Azevedo Souza and the claim for damages on account of the death of Edward Anthony Souza, the evidence is insufficient to sustain the verdict and judgment, in that it appears as matter of law.

(a) That the automobile involved in the collision herein was the automobile of John Martin Souza, that said John Martin Souza at the time and on the occasion of said accident, was driving and operating said automobile and that he so carelessly, negligently and unlawfully drove and operated the same as to proximately cause it to come into collision with a railroad locomotive of the defendant and that such conduct on the part of John Martin Souza was a proximate cause of any injury to him and of any damage to the automobile and the death of his father, Antonio Azevedo Souza, and the death of his brother, Edward Anthony Souza, and

(b) That said conduct of said John Martin Souza was the sole proximate cause of said injury, damage and deaths, and

(c) That said conduct of said John Martin Souza was and is, as matter of law, imputed to his said father and his said brother on the ground that all three were engaged in a joint venture, and

(d) That said conduct on the part of said John Martin Souza was and is, as matter of law, imputed to his said father on the ground that said John Martin Souza was, at the time and on the occasion of said accident, a minor and was driving and

operating said automobile with the knowledge and consent of his parents and of his father, and, in particular, said conduct was, and is so imputed by reason of Section 352(b) of the Vehicle Code of the State of California, and

(e) That each Antonio Azevedo Souza and Edward Anthony Souza was guilty of contributory negligence, and

(f) That there was no negligence on the part of defendant Southern Pacific Company which was a proximate cause of said accident or any resulting injury, damage or death.

3. That appellant's motions for a directed verdict and for judgment notwithstanding the verdict were erroneously denied and should have been granted and that judgment should be reversed with directions, severally as to each claim on account of injury, damage or death, to enter judgment for the appellant (the defendant below).

4. The Court erred in giving instructions and in denying instructions proposed by appellant, as defendant below, to which rulings appellant-defendant duly objected and excepted.

5. The Court erred in receiving evidence over the objections of appellant-defendant and particularly in receiving testimony of the witness Johnson (given by deposition) of statements claimed to have been made after the accident herein involved by the locomotive engineer, Glanville.

II.

DESIGNATION

Appellant hereby designates as all of the record which is material to the consideration of this appeal, and designates for printing, the whole of the certified record on appeal.

Dated: January 17, 1949.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Appellant

Southern Pacific Company.

(Affidavit of Service by Mail.)

[Endorsed]: Filed January 17, 1949. Paul P. O'Brien, Clerk.

